Supreme Court, U.S.
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NO.

In the Supreme Court of the United States

RANCHO LOBO, LTD.,
Petitioner,

v.

ANTONIO DEVARGAS, PATRICIO ANTONIO GARCIA, GILBERT CHAVEZ, MOISES MORALES, ALFREDO MONTOYA, NELSON CORDOVA, AND THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF RIO ARRIBA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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15 pp

QUESTIONS PRESENTED

1. Whether the Tenth Circuit Court of Appeals properly applied New Mexico state preemption standards to reverse a decision of a New Mexico Federal District Court Judge in a diversity case concerning the local licensing of timber harvesting for wildfire prevention within the State of New Mexico.

2. Whether the Tenth Circuit Court of Appeals abused its discretion by not requesting certification to the New Mexico Supreme Court after the New Mexico Federal District Court and the Tenth Circuit Court of Appeals came to opposite conclusions on the preemption of the licensing of timber harvesting by state law and the Governor of New Mexico intervened on behalf of state preemption as a public safety issue.

PARTIES TO THE PROCEEDING

Petitioner is Rancho Lobo, Ltd., a Texas Limited Partnership. Petitioner Rancho Lobo, Ltd. was the Plaintiff and Counter-Defendant in the District Court and the Appellee before the Tenth Circuit Court of Appeals.

Respondents are Antonio DeVarges, Patrico Antonio Garcia, Gilbert Chavez, Moises Morales, Alfredo Montoya, Nelson Cordova, in their Individual and Official capacities as County Commissioners, and the Board of County Commissioners for the County of Rio Arriba, in the State of New Mexico. Respondents were the Defendants and Counter-Plaintiffs in the District Court and the Appellants before the Tenth Circuit Court of Appeals.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Tenth Circuit Court of Appeals Opinion (App. B at 3a - 24a) is reported at *Rancho Lobo v. DeVarges*, 303 F.3d 1195 (10th Cir. 2002). The New Mexico District Court Memorandum and Opinion, Civ. No. 00-925 JP/DJS (App. D at 29a - 40a) is not reported.

STATEMENT OF JURISDICTION

The Tenth Circuit Opinion was entered on August 20, 2002 (App. B at 3a). The Court of Appeals entered an order denying a timely petition for rehearing *en banc* on September 17, 2002 (App. A at 1a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This is a diversity case under 28 U.S.C. § 1332. This case concerns the application of 28 U.S.C. § 1652, which provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

The local provision involved in this case is the Rio Arriba County Timber Harvest Ordinance (App. F., Exhibit.1, at 67a - 114a). The county restrictions at issue (App. F at 72a and 86a) state:

> Clear cutting: Harvest technique involving the removal of all trees from the area in question (such as one acre or a cutting unit) and leading to the establishment of an even-aged stand composed of naturally or artificially established trees not there before the cutting.
>
> . . .
>
> **1. Sustainability of Timber Production:** . . . Clear cutting without a valid sivicultural purpose is prohibited without a variance granted pursuant to this ordinance. . .

See the procedure for obtaining a variance in Article VII Variances (App. F at 104a - 107a).

The state laws which preempt the Timber Harvest Ordinance in its entirety are N.M. Stat. Ann. § 9-5A-4(C) (App. G at 120a), § 68-2-8 (App. G at 122a), § 68-2-14 (App. G at 124a), and § 68-2-16 (App. G at 125a). N.M. Stat. Ann. 9-5A-4(C) (App. G at 120a) specifically provides:

> C. the forestry division shall enforce and administer all laws and regulations relating to forestry on lands within the state;

The rule for certification of legal questions to the New Mexico Supreme Court is 10th Cir. R. 27.1 (App. G at 115a). The New Mexico rule accepting certification from other courts is N.M. App. P. R.12-607 (App. G. at 117a.)

STATEMENT OF THE CASE

In this case, the Tenth Circuit Court of Appeals in Denver, Colorado, intervened on behalf of a local New Mexico county timber harvesting ordinance against the New Mexico state Forestry Division at the height of a drought induced forest fire season. Specifically, Petitioner, a Texas limited partnership, acquired some forested land in Rio Arriba County, New Mexico for the purpose of establishing a game preserve. In February 2000, Petitioner applied for and obtained a state license to harvest timber in order to promote residual tree health and to prevent wild forest fires (App. H at 127a-128a).

In March, 2000 Rio Arriba County assistant county planner, Antonio DeVarges, notified Petitioner that it could not proceed with its timber maintenance unless Petitioner applied for and obtained a county permit, in addition to their state permit (App. I at 129a -130a). The county ordinance prohibited clear cutting of timber without a special variance (App. F at 72a and 86a). The state statute, on the other hand, specifically insured the preservation of clear cutting by landowners for a multitude of purposes, N.M. Stat. Ann. 1978, § 68-2-16 (App. G at 125a):

> . . .Nothing in the Forest Conservation Act shall prevent a landowner hereafter from converting forest vegetative types to nonforest vegetative types for such purposes as range, wildlife habitat, farming, surface mining or subdivision development; . . .

Petitioner refused to apply for a county license and

sued Respondents in federal court under its diversity jurisdiction and for an unconstitutional taking by the county. Petitioner also requested a declaratory judgment holding that the Rio Arriba County Timber Harvest Ordinance had been preempted by state statutory law. N.M.Stat. Ann. § 68-2-16 (App.G at 125a); § 68-2-14 (App. G at 124a); and § 9-5A-4(C) (App. G at 120a).

Petitioner requested a partial summary judgment declaring that the Rio Arriba Timber Harvest Ordinance had been preempted by the state statutes quoted above. Petitioner also requested certification to the New Mexico Supreme Court under N.M. App. P. R. 12-607 (App. G at 117a), in order to eliminate the possibility of any inconsistent holding by the federal court, sitting in a diversity action. Respondents filed a cross-motion for summary judgment on the validity of the Rio Arriba Timber Harvest Ordinance.

In March 2001, Judge James Parker, a long-term New Mexico Federal District Court Judge sitting in Albuquerque, New Mexico, held that certification to the New Mexico Supreme Court Supreme Court was unnecessary:

> I believe that there is sufficient controlling New Mexico law to allow me to decide the validity question without resorting to mere speculation on how New Mexico courts would decide the question. I, therefore, find that certification of the validity question to the New Mexico Supreme Court is unnecessary.

(App. D at 32a) Judge Parker found that the Rio Arriba Timber Harvest Ordinance conflicted with the statutory preservation of clear cutting:

> I, therefore, find that the undisputed facts show that the County Ordinance's clear cutting provisions conflict with the State Act's allowance of clear cutting.

(App. D at 34a)

Judge Parker held that New Mexico law permits legislative preemption of local law by any clear statement without a supplemental statement that the local governmental entity must comply and cannot operate to the contrary (App. D at 36a). *Casuse v. City of Gallup*, 106 N.M. 571, 746 P.2d 1103 (1987). Therefore, Judge Parker concluded that the legislative statement that the state Forestry Division shall enforce and administer all laws relating to forestry was sufficient to expressly preempt local governmental entities from regulating timber harvests under New Mexico preemption rules:

> The statutory language clearly indicates the legislature's intent to expressly preempt local governmental entities from regulating timber harvests. Accordingly, as a matter of law, the County Ordinance is invalid on that basis. Having found express preemption, there is no reason for me to analyze the implied preemption argument.

(App. D at 36a) Judge Parker entered a partial summary judgment accordingly (App. D at 27a).

Respondents appealed Judge Parker's partial summary judgment to the Tenth Circuit Court of Appeals. The Tenth Circuit Court of Appeals held oral argument on the appeal in spring 2002. After the Tenth Circuit panel expressed concern over the Forestry Division's authority at oral argument,

Petitioners made a motion to certify the preemption issue to the New Mexico Supreme Court pursuant to 10th Cir. R. 27.1 (App. G at 115a). New Mexico's acceptance of questions certified by federal courts is governed by N.M. App. P. R.12-607 (App. G at 117a).

In August, 2002, the Tenth Circuit Court of Appeals denied Petitioner's motion to certify the preemption issue and reversed Judge Parker's ruling that the Rio Arriba Timber Harvest Ordinance was preempted by state statutes. *Rancho Lobo, Ltd..*, 303 F.3d at 1207 (10th Cir. 2002) (App. A at 24a). The Tenth Circuit Court of Appeals reasoned that in the absence of a New Mexico Supreme Court ruling on the authority of the Forestry Division, it must and could "predict" the course the Supreme Court would take if confronted with the problem. *Rancho Lobo*, 303 F. 3rd at 1202 n. 2 (App. A at 13a - 14a). This prediction was made on the basis of *San Pedro Mining Corp. v. Board of County Comm'rs*, 121 N.M. 194, 909 P.2d 754 (Ct. App. 1995), a New Mexico Court of Appeals decision interpreting the New Mexico Mining Act. *Rancho Lobo*, 303 F.3d at 1202-1205 (App. A at 13a - 19a).

The Tenth Circuit Court of Appeals held that the statutory language giving the Forestry Division the authority to enforce and administer all laws and regulations relating to forestry and to logging and timber operations and practices did not preempt local governments from regulating logging because there was no language that the state statute superceded other laws or that other laws have no effect.

> However, while the above-cited language authorizes the Forestry Division to enforce and administer all laws and regulations relating to timber harvesting, it does not give the Division exclusive power to do so, nor does it expressly

> prohibit local governments from enacting and enforcing laws relating to timber harvesting.

Rancho Lobo, 103 F.3d at 1202 (App. A at 13a).

After receiving the Opinion, Petitioner filed a timely motion for a rehearing *en banc*. On September 10, 2002, the Governor of New Mexico filed an *amicus curiae* brief in support of Petitioner's motion (App. F at 43a -57a). The Governor attached his declaration of a drought emergency from April 26, 2002 (App. F at 58a - 60a). The Governor argued that New Mexico had been battling drought induced wildfires since 2000, and that despite local concerns, the state needed the exclusive executive authority vested in the Forestry Division to control wildfires in New Mexico forests (App. F at 50a). The Tenth Circuit Court of Appeals denied Petitioner's motion for rehearing *en banc* on September 17, 2002 (App. A at 1a - 2a).

REASONS FOR GRANTING THE PETITION

I. The Decision of the Tenth Circuit is Incorrect.

In contrast to federal preemption standards, the New Mexico Supreme Court does not require a special preemption provision in a state statute in order to establish express preemption where the legislative intent to preempt local ordinances is clear.

The Tenth Circuit Court of Appeals did not dispute that a New Mexico statute gives the Forestry Division the authority to "enforce and administer all laws and regulations relating to forestry on lands within the state." *Rancho Lobo*, 303 F.3d at 1202 (App. A at 13a). However, the Tenth

Circuit Court of Appeals concluded that this language was not an express preemption of county ordinances concerning forestry because it did not state that the Forestry Division had the exclusive power to regulate timber harvesting or specifically prohibit local governments from enacting and enforcing laws concerning timber harvesting. *Rancho Lobo*, 303 F.3d at 1202, App. A at 13a.

Despite the many other references to the New Mexico Court of Appeals decision in *San Pedro Mining Corp.*, the Tenth Circuit's conclusion is, in fact, an application of federal preemption standards, where an express provision in a statute must contain special preemptive language that the statute supercedes other laws or that no laws shall have effect. *Geier v. American Honda Motor Company, Inc.*, 529 U.S. 861, 867-868 (2000) applied to ERISA in *Rush Prudential HMO, Inc. v. Moran*, ___ U.S. ___, 122 S. Ct. 2151, 2158-2159 (2002).

In contrast to federal preemption law, the New Mexico Supreme Court has held for many years that express preemption can arise from statutory language which makes it clear that the legislature intended to preempt a governmental area "without necessarily stating that affected municipalities must comply and cannot operate to the contrary." *Casuse*, 106 N.M. at 573, 746 at 1105; *see also*, *Westgate Families v. County Clerk of the Incorporated County of Los Alamos*, 100 N.M. 146, 148, 667 P.2d 453, 455 (1983), and *State ex rel. Haynes v. Bonem*, 114 N.M. 627, 634, 845 P.2d 150, 157 (1992).

To the extent that the New Mexico Court of Appeals decision in *San Pedro Mining Corp.*, 21 N.M. at 198-199, 909 P.2d at 758-759, can be read as requiring statutory language to contain an accompanying statement that

municipalities cannot operate to the contrary in order to establish express preemption, it would not be upheld by the New Mexico Supreme Court. *American Civil Liberties Union of New Mexico v. City of Albuquerque*, 128 N.M. 315, 319, 992 P.2d 866, 870 (1999); *Westgate Families*; *Haynes* and *Casuse*.

The reason for New Mexico's different standard for express preemption is the different political structural relationship between local governmental units and their states, as opposed to the relationship between the federal government and the states. Under the federal system, states are sovereign entities whose laws cannot be preempted unless there is a clear and manifest intent by Congress. *Geier*, 529 U.S. at 887, dissenting opinion citing to *Alden v. Maine*, 527 U.S. 706 (1999). Therefore, every federal preemption case is "about federalism." *Id.*

The Tenth Circuit Court of Appeals notes that counties have many municipal powers in New Mexico. *Rancho Lobo*, 303 F.3d at 1200 (App. B at 10a). However, a New Mexico county is not a sovereign body and so the municipal powers are mere privileges granted by the state legislature. Thus, a New Mexico county is "but a political subdivision of the State." *Board of Commissioners of Rio Arriba County v. Greacen*, 129 N.M.177, 179, 3 P.3d 672, 674 (2000), holding that Rio Arriba County lacked the authority to direct that fines from traffic violations be paid to the county rather than to the Administrative Office of the Courts. A New Mexico preemption case is merely about dividing powers between the sovereign state and its political subdivisions, and, in the present case, about a non-resident landowner being harassed by unreasonable local authorities. Because a New Mexico preemption case does not involve federalism, it is improper for the Tenth Circuit Court of Appeals to interject

federalism concerns into an analysis of the intent of the New Mexico State legislature in regard to the authority of the New Mexico state Forestry Division.

II. The Question Presented is of Vital Importance to the Health and Safety of the Citizens of New Mexico.

The effect of the Tenth Circuit Court of Appeals opinion is to limit the State of New Mexico's ability to manage and protect the state's forests from wildfire and to protect persons and property within those forests and in the "wildland/urban interface."

Under ordinary circumstances, this appeal could be dismissed as an erroneous application of a rule of law by the Tenth Circuit Court of Appeals with limited application outside the interests of Petitioners. However, Respondents chose to make their stand against clear-cutting for wildfire prevention in the same year as the Cerro Grande fire which started as a controlled burn and spread to the city of Los Alamos where it destroyed 235 homes and forced the evacuation of 18,000 people (App. F at 48a). Since the spring of 2002, drought conditions in the State of New Mexico have continued to pose a danger from wildfire requiring the attention of the Governor and the executive divisions of the State of New Mexico (App. F at 49a).

The Governor of New Mexico filed a brief in the present case arguing that the Forestry Division needed its full legislative authority to encourage timber harvesting as a prophylactic activity by removing potential fuel for wildfires, on the one hand, and, on the other hand, to restrict timber harvesting actions which can trigger a forest fire such as a spark from a chain saw (App. F at 52a).

The health and safety needs of the people of New Mexico was forcefully presented to the Tenth Circuit Court of Appeals in the Governor's *Amicus* Brief on Petitioner's motion for rehearing (App. F at 43a). However, the Tenth Circuit Court of Appeals sits in Denver, Colorado and lacks a sense of urgency concerning New Mexico's forest fire needs and the Governor's proposed remedy. This brings us to the Tenth Circuit's abuse of discretion in failing to use the procedure for certifying state law issues in diversity cases.

III. The Tenth Circuit is in Need of this Court's Supervisory Power.

The Tenth Circuit Court of Appeals has exhibited a pattern of circumventing modern procedures for determining novel unsettled questions of state law in diversity cases.

10th Cir. R. 27.1 (App. G at 115a) provides for certification of unsettled issues of state law to the state Supreme Court according to state rule. N.M. App. P. R. 12-607 (App. G at 117a) provides for certification of state law issues from federal and other courts.

In this appeal, the Federal District Court stated:

> I believe that there is sufficient controlling New Mexico law to allow me to decide the validity question without resorting to mere speculation on how New Mexico courts would decide the question. I , therefore, find that certification of the validity question to the new Mexico Supreme Court is unnecessary.

(App. D at 32a) The Tenth Circuit Court of Appeals stated:

> Absent a definitive ruling from a state's highest court, "we must predict the course that body would take if confronted with the issue."

Rancho Lobo, 103 F.3rd at 1202, n.2 (App. A at 13a), emphasis added. The Federal District Court found that the New Mexico Supreme Court would rule that the county timber harvesting ordinance at issue was preempted by state forestry law, and the Tenth Circuit Court of Appeals "predicted" that the New Mexico Supreme Court would rule that same ordinance was not preempted by state law.

Historically, federal courts have abstained when state law was unclear. This Court has endorsed the modern practice of certifying the case to the state supreme court whenever there are "novel, unsettled questions of state law." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997). Despite the certification procedure in place, the Tenth Circuit Court of Appeals has consistently refused to certify cases to state supreme courts. *American Civil Liberties Union v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *Copier v. Smith & Wesson Corp.*, 138 F.3d 833 (10th Cir. 1998); *Harvey E. Yates Co. v. Powell*, 98 F.3d 1222 (10th Cir. 1996); and *Ormsbee Development Co. v. Grace*, 668 F.2d 1140 (10th Cir. 1982).

In the present case, the Tenth Circuit Court of Appeals' refusal to certify the case to the New Mexico Supreme Court before reversing a decision on New Mexico law by an experienced New Mexico Federal District Court judge has created a major crisis in the State of New Mexico (App. F at 48a - 49a). The refusal of the Tenth Circuit Court of Appeals to utilize the certification procedure in the face of an executive crisis concerning wildfire prevention in New

Mexico is grounds for this Court to exercise its supervisory power.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-2196

[Filed September 17, 2002]

RANCHO LOBO LTD, a Texas limited partnership, Plaintiff-Counter-Defendant-Appellee,	)
v.	)
ANTONIO DEVARGAS, PATRICIO ANTONIO GARCIA, GILBERT CHAVEZ MOISES MORALES, ALFREDO MONTOYA and NELSON CORDOVA, in their individual and official capacities; RIO ARR/BA BOARD OF COUNTY COMMISSIONERS, Defendants-Counter-Claimants-Appellants.	)

Before EBEL, McKAY and BRISCOE, Circuit Judges.

ORDER

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ _____
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-2196

[Filed August 20, 2002]

RANCHO LOBO, LTD,	)
a Texas limited partnership,	)
Plaintiff-Counter-Defendant-Appellee,	)
	)
v.	)
	)
ANTONIO DEVARGAS, PATRICIO ANTONIO GARCIA, GILBERT CHAVEZ, MOISES MORALES, ALFREDO MONTOYA, and NELSON CORDOVA, in their individual and official capacities; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF RIO ARRIBA,	)
Defendants-Counter-Claimants-Appellants.	)

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
D.C. No. CIV-00-925-JP/DJS

JUDGES:
Before EBEL, McKAY, and BRISCOE, Circuit Judges.

OPINION

BRISCOE, Circuit Judge.

Defendants, all members of the Board of Commissioners of the County of Rio Arriba, New Mexico (hereinafter "the County") appeal from a decision of the district court holding that the Rio Arriba County Timber Harvest Ordinance is invalid because it is preempted by the New Mexico Forest Conservation Act, N.M.S.A. 1978 §§ 68-2-1 *et seq.*, and also holding that the ordinance's provisions for requiring an environmental assessment are invalid because they delegate unlimited power to the county planning and zoning commission. The County contends that the Timber Harvest Ordinance is not preempted by the Act, but instead asserts there is room for concurrent jurisdiction. The County further contends that the Timber Harvest Ordinance's provisions for environmental assessment do not improperly delegate unlimited power to the Planning and Zoning Commission. We reverse and remand.

I.

The facts in this case are undisputed. The New Mexico Forest Conservation Act establishes the State Forestry Division, which is authorized to enforce all laws, rules and regulations relating to all forested, cutover or brushlands within the state under the following circumstances:

A. prevention and suppression of fires;

B. logging and timber operations and practices;

C. trespass, waste and littering; and

> D. conservation of commercial forest lands and products.

N.M.S.A 1978, § 68-2-14. The Division is authorized to make and enforce rules and regulations "for the prevention and suppression of forest or brush fires, and for the control of forest pests and for the application of commercial forest practices within the state." *Id.*, § 68-2-16. Section 68-2-16 also provides:

> Nothing in the Forest Conservation Act [citation omitted] shall prevent a landowner hereafter from converting forest vegetative types to nonforest vegetative types for such purposes as range, wildlife habitat, farming, surface mining or subdivision development; provided, however, any slash resulting from such conversion shall be treated in a manner that will minimize the spread of forest fires and the possibility of insect epidemic.

Pursuant to its authority under the Forest Conservation Act, the Division has promulgated a series of regulations concerning tree harvesting and forest regeneration. 19 NMAC 20.2.[1] The objective of this series of regulations is to "require appropriate forest resource management in order to assist in the prevention and suppression of forest fires, the control of forest pests and to maintain and enhance the economic benefits of forests and forest resources to New Mexico." 19

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[1] Since the district court's decision, the New Mexico Administrative Code has been revised. For clarity, the prior citation style will be used.

NMAC 20.2.6. The regulations require a state harvest permit for the harvest of commercial forest species in an area of twenty-five acres or more, and require submission of the method of harvesting and the treatment of skid trails and slash, as well as a forest regeneration plan. 19 NMAC 20.2.8-20.2.10.

In response to a threat to its watershed caused by erosion from timber harvesting on private lands, the County in 1998 enacted the Timber Harvest Ordinance under its zoning authority and power to provide for the general welfare. The purpose of the ordinance is:

> to protect, maintain and restore fully functional forests and streams, rivers, watersheds and acequias while permitting the harvest of forest goods; to protect against immediate and long range threats to the quality of the Rio Arriba County's water; to preserve local customs, culture and traditions; to preserve the bosques from harm and exploitation; to protect landowners and the property value of timberlands; to encourage the location of compatible uses of land; to promote sustainable logging practices; to encourage logging operations within Rio Arriba County; and to protect the health, safety and welfare of the citizens of Rio Arriba County.

Timber Harvest Ordinance, Article II.

The Timber Harvest Ordinance requires those who wish to harvest timber to obtain a county permit in most instances. If a permit is required, the applicant must present a timber harvest plan detailing the action, including a plan to control erosion. *Id.*, Article VI(B)(4). In evaluating a plan, the county planning and zoning department considers: 1) the sustainability of timber production; 2) economic development and local employment; 3) water quality and availability; 4) soil protection; 5) logging roads and hauling; 6) harvest selection, techniques, old growth management and reforestation; 7) archeological, historic and cultural resources; 8) abatement of noise, dust, smoke and traffic; 9) hours of operation; 10) compatibility with adjacent land uses; and 11) the effect of existing harvests on the application. *Id.*, Article VI(C). In some cases where the planning and zoning department finds that the proposed harvest would create a significant environmental impact, the applicant may be required to prepare an environmental assessment. *Id.*, Article VI(H), (I).

The Timber Harvest Ordinance requires compliance with measures that are recommended but left voluntary under the state scheme. Erosion control plans, logging roads, drainage systems, buffer zones to protect riparian areas, and regeneration plans must comply with the best management practices recommended in the New Mexico Guidelines. *Id.*, Article VI(B), (C).

In 1991, plaintiff Rancho Lobo acquired property in Rio Arriba County for the purpose of establishing a hunting preserve. In February of 2000, Rancho Lobo applied for and was granted a permit by the Forestry Division to harvest trees in order to "[r]elease understory trees," "[i]mprove residual

tree health and growth," "[e]nhance wildlife habitat and utilization in the areas," "[p]romote the Englemann spruce as a stand component and/or aspen regeneration," and "[p]repare future prescribed burn areas by removing white fir and mistletoed Douglas fir from ponderosa pine/Douglas fir stand types and enhance their establishment." Aplt. App. at 85.

In March 2000, the County informed Rancho Lobo that it needed to apply for a county timber harvest permit under the Timber Harvest Ordinance. Rancho Lobo refused to seek a permit, and instead filed an action arguing that the ordinance was invalid because it conflicted with and was preempted by the Forest Conservation Act, that enforcement of the ordinance constituted a taking in violation of the Fifth and Fourteenth Amendments, and that the ordinance illegally deprived Rancho Lobo of its property.

Both parties filed motions for summary judgment on the issue of the validity of the ordinance. In its motion, Rancho Lobo alleged that the Timber Harvest Ordinance was invalid because it was preempted by the Forest Conservation Act and was not a proper use of the County's zoning authority. In ruling on the cross-motions, the district court first determined there was sufficient controlling New Mexico law for it to decide the validity of the ordinance without certifying the question to the New Mexico Supreme Court. The district court held that the Timber Harvest Ordinance conflicted with the Forest Conservation Act because the Act allows clear-cutting while the ordinance prohibits clear-cutting without a variance being obtained. The district court also held that the ordinance conflicted with the Forest Conservation Act because the ordinance required a more extensive and stricter

permitting process.

On the issue of preemption, the district court found that the statutory language of the Forest Conservation Act providing that the Forestry Division is authorized to make and enforce rules and regulations, and enforce all laws, rules and regulations relating to forestry, logging and timber operations indicated an express preemption of the Timber Harvest Ordinance. The district court further found that although the ordinance was a valid exercise of zoning authority, its provision for requiring an environmental assessment was not a valid exercise of authority because it gave the county planning and zoning department "unlimited power" to determine who would be required to prepare an environmental assessment. Ultimately, the district court held that the entire Timber Harvest Ordinance was expressly preempted by the Forest Conservation Act, and was therefore invalid. As a result, the district court granted partial summary judgment in favor of Rancho Lobo. The district court certified the partial summary judgment as a final judgment pursuant to Fed. R. Civ. P. 54(b).

II.

The County contends that the district court erred in determining that the New Mexico Forest Conservation Act preempted the County Timber Harvest Ordinance. The County argues there is no preemption, either express or implied, and that the ordinance does not conflict with the Forest Conservation Act, thus leaving room for concurrent regulation.

We have jurisdiction over Rancho Lobo's preemption claim because of the diversity of the parties. A federal court sitting in diversity applies the substantive law of the forum state. *Commerce Bank, N.A. v. Chrysler Realty Corp.*, 244 F.3d 777, 780 (10th Cir. 2001). We review the district court's determination of state law de novo. *Id.*

New Mexico law on preemption

Counties in New Mexico are granted almost the same powers as municipalities. *See* N.M.S.A. 1978, § 4-37-1 (same powers "except for those powers that are inconsistent with statutory or constitutional limitations placed on counties"). The powers granted to counties include the power to enact zoning ordinances and those ordinances that are "necessary and proper to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of any county or its inhabitants." Id. *See Board of Comm'rs of Rio Arriba County v. Greacen*, 2000 NMSC 16, 3 P.3d 672, 677, 129 N.M. 177 (N.M. 2000). Where a county ordinance conflicts with a state statute, the state statute controls. *See Greacen*, 3 P.3d at 677-78. However, there is no invasion of state statutory authority where the local ordinance "'merely complements the statute and is nowhere antagonistic therewith.'" 3 P.3d at 678 (quoting *State ex rel. Coffin v. McCall*, 58 N.M. 534, 273 P.2d 642, 644 (N.M. 1954)).

With regard to the preemption of local ordinances by state law, the New Mexico Supreme Court has held that, generally, in order to limit the power of local government, some express statement of the power denied must be contained in the state law. *See Apodaca v. Wilson*, 86 N.M.

516, 525 P.2d 876, 881 (N.M. 1974). However, "any New Mexico law that clearly intends to preempt a governmental area should be sufficient without necessarily stating that affected municipalities must comply and cannot operate to the contrary." *Casuse v. City of Gallup*, 106 N.M. 571, 746 P.2d 1103, 1105 (N.M. 1987). In *San Pedro Mining Corp. v. Board of County Comm'rs*, 1996 NMCA 002, 121 N.M. 194, 909 P.2d 754 (N.M. App. 1995), the court summarized New Mexico state/local preemption law as follows:

> A local governmental body's ability to regulate in an area may be preempted either expressly, by the language of a statute, or impliedly, due to a conflict between the local body's ordinances and the contents, purposes, or pervasive scheme of the statute. . . . A local government is presumed to retain the power to exercise its normal authority over an activity, so the intention of the legislature to preempt local control must be clearly stated if express preemption is to result. . . .
>
> . . . .
>
> Even in the absence of express preemption by the legislature, a county ordinance may be preempted if it conflicts with a state statute or regulation, or if the statute demonstrates an intent to occupy the entire field.

Id. at 758-59.

Therefore, under New Mexico law, there are three ways a state statute can preempt a local ordinance: 1)

expressly, because the statute contains language stating that it preempts local ordinances, *see Apodaca*, 525 P.2d at 881; 2) impliedly, because the ordinance and the state statute conflict, *see Greacen*, 3 P.3d at 677-78; or 3) impliedly, because the statute demonstrates an intent to occupy the entire field, *see Casuse*, 746 P.2d at 1105.

Express preemption

The district court concluded that the Forest Conservation Act "expressly" preempted local governments from regulating the timber harvest. However, under New Mexico law, this characterization is incorrect. In order to expressly preempt a local ordinance, the legislature must clearly state its intention to do so. *See San Pedro Mining*, 909 P.2d at 758. There is no such clear statement of intent in the Forest Conservation Act.

The district court's conclusion that the Forest Conservation Act expressly preempted the ordinance was based on language in the Act giving the Forestry Division the power to "make and enforce rules and regulations not in conflict with any law now in force as it deems necessary for the . . . application of commercial forest practices within the state," N.M.S.A. 1978, § 68-2-16, to "enforce all laws, rules and regulations relating to all forested, cutover or brush lands lying within the state under the following circumstances . . . logging and timber operations and practices . . . conservation of commercial forest lands and products," *id.*, § 68-2-14, and to "enforce and administer all laws and regulations relating to forestry on lands within the state," *id.* § 9-5A-4(C). The district court concluded that "[t]he statutory language clearly indicates the legislature's intent to expressly preempt local

governmental entities from regulating timber harvests." Order at 7.

However, while the above-cited language authorizes the Forestry Division to enforce and administer all laws and regulations relating to timber harvesting, it does not give the Division exclusive power to do so, nor does it expressly prohibit local governments from enacting and enforcing laws relating to timber harvesting. Therefore, the Forest Conservation Act does not set forth in a clear and unambiguous manner the legislature's intent to expressly preempt local regulation.

In *San Pedro Mining*, the court addressed a preemption situation similar to the one at issue here.[2] The

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[2] When sitting in diversity jurisdiction, a federal court must apply the law of the forum state as announced by that state's highest court. *See Cooper v. Cent. Southwest Servs.*, 271 F.3d 1247, 1251 (10th Cir. 2001). Absent a definitive ruling from a state's highest court, "we must predict the course that body would take if confronted with the issue." *Vanover v. Cook*, 260 F.3d 1182, 1186 (10th Cir. 2001) (internal quotation omitted). Consequently, because *San Pedro Mining* is a decision from the New Mexico Court of Appeals, an intermediate court in that state, it cannot be considered a controlling decision from New Mexico's highest court, the New Mexico Supreme Court. We recently explained, however, that "'[w]here an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that it is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.'" *Webco Indus., Inc. v. Thermatool Corp.*, 278 F.3d 1120, 1132 (10th Cir. 2002) (quoting *Hicks ex rel. Feiock v.*

question was whether a county's mining ordinance was preempted by the New Mexico Mining Act. The plaintiff in that case claimed express preemption, pointing to language in the New Mexico Mining Act stating that "after the effective date of the New Mexico Mining Act and until the commission adopts regulations necessary to carry out the provisions of the New Mexico Mining Act, county mining laws or ordinances shall apply to mining within their jurisdictions in New Mexico." 909 P.2d at 759. The plaintiff argued this provision of the New Mexico Mining Act meant that after the commission had adopted regulations necessary to carry out the Act, the local ordinances were preempted. However, the court disagreed, stating:

> It is certainly possible to read this Section as Plaintiff does, to mean that once the referenced regulations are adopted, no county regulation or ordinance shall apply to mining activity, whether or not the ordinance conflicts with the state regulations or the statute. It is also possible, however, that the legislature included this provision only to ensure that local ordinances governing the same matters as the statute would not be immediately rendered ineffective by the mere passage of the statute, which would have left those matters

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Feiock, 485 U.S. 624, 630 n.3, 99 L. Ed. 2d 721, 108 S. Ct. 1423 (1988)). Based on our reading of decisions from the New Mexico Supreme Court, we do not believe that court would reach a different outcome than that reached in *San Pedro Mining*. Consequently, we follow the analysis in *San Pedro Mining*.

> uncontrolled pending the commission's adoption of the regulations required by the statute. Given the absence of an explicit prohibition of any type of local regulation of mining after the adoption of the regulations, and given the fact that the Act and its regulations are not comprehensive in scope but govern only certain aspects of mining, we believe the Act is ambiguous concerning its effect on local mining ordinances.

Id.

In *San Pedro Mining*, the court cited the New Mexico Pesticide Control Act, specifically N.M.S.A. 1978 § 76-4-9.1, as a statute which contained language creating an express preemption. That statute unambiguously precludes local control over pesticides by stating: "Except as otherwise authorized in the Pesticide Control Act, no city, county or other political subdivision of the state and no home rule municipality shall adopt or continue in effect any ordinance, rule, regulation or statute regarding the registration, labeling, distribution, sale, handling, use, application, transportation or disposal of pesticides." N.M.S.A. 1978 § 76-4-9.1. The court concluded the New Mexico Mining Act did not expressly preempt the county mining ordinance in question.

As with the mining act at issue in *San Pedro Mining*, the Forest Conservation Act does not contain language which unambiguously reflects an intent to expressly preempt local legislation regarding timber harvests. We therefore hold that the district court erred in concluding that the Forest Conservation Act expressly preempted the ordinance in

question.

Our determination with regard to express preemption does not end our inquiry, however, because Rancho Lobo also argued the theory of implied preemption, even though the district court did not address that theory. New Mexico law recognizes that a statute may be impliedly preempted even though the requirements for express preemption are not met. *See San Pedro Mining*, 909 P.2d at 758-59. We therefore address the question of implied preemption. *See Chandler v. City of Arvada*, 292 F.3d 1236, 1242 (10th Cir. 2002) (holding that this court is free to affirm a district court's decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court).

Implied preemption by occupying area of law

We cannot rely on our conclusion that the Forest Conservation Act did not expressly preempt the Timber Harvest Ordinance to also conclude that the Act did not impliedly preempt the ordinance. Under New Mexico law, preemption may be implied if it is evident from the language of the New Mexico law at issue that the legislature "clearly intended to preempt a governmental area." *Casuse*, 746 P.2d at 1105; *see San Pedro Mining*, 909 P.2d at 759. Therefore, we next examine the Forest Conservation Act and determine whether the New Mexico legislature intended to preempt the entire area of regulation regarding timber harvesting, or whether it left room for local regulation.

There is some support for the conclusion that the Forest Conservation Act occupies the entire area of forestry

regulation. The Act contains provisions granting the Forestry Division sweeping powers to make rules and regulations regarding timber harvests, and to enforce "all" rules and regulations regarding logging, timber and forestry. Further, the rules and regulations promulgated by the Forestry Division are fairly comprehensive with regard to the circumstances under which logging will be allowed, in that they require a state harvest permit for the harvest of commercial forest species in an area of twenty-five acres or more, and the permitting process requires submission of the method of harvesting and proposed treatment of skid trails and slash, as well as a forest regeneration plan. *See* 19 NMAC 20.2.8 -20.2.10.

However, this was also the case with the New Mexico Mining Act at issue in *San Pedro Mining*. In examining the New Mexico Mining Act, the court in *San Pedro Mining* first determined that the primary focus of the Act was to minimize the damage to the land being mined, and that the Act and regulations promulgated under it required specific closeout plans, including plans for reclamation that had to be submitted before a state permit could be obtained. The court also found that the Act required mining activity to be conducted in such a way as to minimize erosion and to ensure that toxic waste did not leave the permit area. Further, the regulations under the Act were very specific about requirements for the diversion of streams, impounding of water, and the construction of roads. In concluding that implied preemption was not established, however, the court stated:

> Significantly, neither the Act nor the regulations contain any mention of development issues with which local

> governments are traditionally concerned, such as traffic congestion, increased noise, possible nuisances created by blasting or fugitive dues, compatibility of the mining use with the use made of surrounding lands, appropriate distribution of land use and development, and the effect of the mining activity on surrounding property values. . . . The County's ordinance does, in part, address many of these concerns. . . . Therefore, there is room for concurrent jurisdiction and regulation, with the County's ordinance regulating aspects of the mining activity that concern off-site safety, compatibility with surrounding property uses, and other matters left unaddressed by the Act and regulations. Plaintiff can accordingly be required to obtain County as well as State approval for its mining activities.

909 P.2d at 759-60.

The relationship between the New Mexico Mining Act and the county ordinance at issue in *San Pedro Mining* is very similar to the relationship between the Forest Conservation Act and the Timber Harvest Ordinance at issue here. The Forest Conservation Act's primary focus is the minimization of damage to the permitted land, and the regulations promulgated under the Act reflect that. However, like the New Mexico Mining Act, the Forest Conservation Act does not really address the kinds of development issues "with which local governments are traditionally concerned." *See* 909 P.2d at 759. While some of the regulations pertain to the protection of permitted property, the main focus of the

Timber Harvest Ordinance is on local issues, such as the amelioration of damage to the surrounding property as the result of timber harvesting, including issues such as the effect of the timber harvest on economic development and local employment, water quality and availability, soil protection, archeological, historic and cultural resources, abatement of noise, dust, smoke and traffic, hours of operation, compatibility with adjacent land uses, cumulative effect when combined with existing harvests.

From our review of New Mexico law, especially *San Pedro Mining*, we conclude that, in passing the Forest Conservation Act the legislature left room for concurrent jurisdiction over local forestry issues, and that the Forest Conservation Act does not impliedly preempt the Timber Harvest Ordinance by occupying the entire field of regulation relating to timber harvesting in New Mexico.

Implied preemption because of conflict

Even in the absence of express preemption or implied preemption from intent to occupy the field, an ordinance may still be impliedly preempted where it conflicts with the state statute. *See Greacen*, 3 P.3d at 677-78; *San Pedro Mining*, 909 P.2d at 759. The district court found that the Timber Harvest Ordinance conflicted with the Forest Conservation Act in two instances: 1) the ordinance has stricter requirements than the Act for obtaining a permit; and 2) the Act allows clear-cutting while the ordinance prohibits it unless a variance is obtained.

The district court erred when it concluded that the ordinance and Act were in conflict because the ordinance has

stricter requirements for obtaining a permit. Under New Mexico law, an ordinance is not necessarily invalid because it provides for greater restrictions than state law; rather, the test is whether the ordinance permits an act the general law prohibits, or prohibits an act the general law permits. *Incorporated County of Los Alamos v. Montoya*, 108 N.M. 361, 772 P.2d 891, 895 (N.M. App. 1989). The mere fact that a company is required to obtain local as well as state approval for its activities does not result in a conflict between the two regulatory schemes. *See San Pedro Mining*, 909 P.2d at 760.

The district court also concluded that a conflict existed between the Forest Conservation Act and the Timber Harvest Ordinance with regard to clear-cutting. The ordinance bans clear-cutting without a variance. Timber Harvest Ordinance, Article VI(C)(3). However, the Forest Conservation Act expressly states that nothing in its act "shall prevent a landowner hereafter from converting forest vegetative types to nonforest vegetative types for such purposes as range, wildlife, habitat, farming, surface mining or subdivision development." N.M.S.A. 1978, § 68-2-16. The district court held these provisions to be conflicting, stating: "In other words, the State Act allows clear cutting while the County Ordinance prohibits clear cutting if a variance is not obtained." Order at 5. We disagree. Section 68-2-16 does not state that landowners "shall have the right to clear-cut" or that clear-cutting "is permitted." Similarly, the statute does not state that municipal governments are prohibited from imposing their own restrictions on clear-cutting. Instead, the language of the statute simply makes clear that nothing in the Forest Conservation Act itself is to be interpreted as a ban on clear-cutting activity under the specifically stated

circumstances. As a result, the Forest Conservation Act does not establish an affirmative right to clear-cut, and does not conflict with the Timber Harvest Ordinance's ban on clear-cutting without a variance. The district court erred in determining the Forest Conservation Act preempts the Timber Harvest Ordinance.

III.

We now turn to the County's contention that the district court erred in finding that the provisions of the Timber Harvest Ordinance concerning the requirement of an environmental assessment are invalid because they give the county planning and zoning department unlimited power to decide who will be required to prepare an environmental assessment. The County contends that language stating that an assessment is necessary upon a finding that the proposed harvest would have a "significant effect on watercourses or acequia systems, county or private property, other natural or historic resources, or the public health, safety or welfare" is sufficient guidance to restrict the Department's discretion.

The Timber Harvest Ordinance provisions in question provide that:

> An applicant *may* be required to prepare an Environmental Assessment (EA) for a proposed harvest when the Planning and Zoning Department, upon review of the THP application, finds that the proposed harvest would cause a significant environmental impact. The department's findings shall be in writing and fully state the nature and

> significance of the environmental impact and the legal and factual basis for the finding.

Timber Harvest Ordinance, Article VI(I) (emphasis added.) The ordinance further defines a significant environmental impact as "a significant effect on watercourses or acequia systems, county or private property, other natural or historic resources, or the public health, safety and welfare." *Id.*, Article VI(H.2). Similarly, another portion of the ordinance provides that, where the proposed harvest is part of a combined harvest plan:

> The Planning and Zoning Department *may* order an applicant to prepare an Environmental Assessment pursuant to this ordinance upon a finding that the proposed and existing harvests, when assessed together, would have significant effects on the environment, public and private property and infrastructure, and the public health safety and welfare.

Id., Article VI(C)(11) (emphasis added.) The district court found that these provisions were invalid because use of the word "may" granted the planning and zoning department the "unlimited power to decide which persons will be ordered to prepare an Environmental Assessment."

It is true that, under New Mexico law, a legislative body "may not vest unbridled or arbitrary power in an administrative agency but must furnish a reasonably accurate standard to guide it." *City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 389 P.2d 13, 18 (N.M. 1964). However,

such standards "need not be specific" and broad, general standards are permissible as long as they are capable of a reasonable application and are sufficient to limit and define the agencies' discretionary powers. *Id.*

In this case, the authority of the planning and zoning department to order an environmental assessment is limited by the requirement that such an assessment will be required only in cases where there is a significant environmental impact or where the "proposed and existing harvests, when assessed together, would have significant effects on the environment, public and private property and infrastructure, and the public health safety and welfare." While this may be a broad standard, it is not an impermissible one. The New Mexico Supreme Court has upheld a law with an equally broad standard. *See Parker v. Bd. of City Comm'rs*, 93 N.M. 641, 603 P.2d 1098, 1099-1100 (N.M. 1979). In *Parker*, the court upheld a zoning regulation providing that the board of county commissioners "may" suspend or revoke approval of a plat if the applicant did not submit "sufficient information." The court noted that what constituted "sufficient information" was left to the board, but held that it was a valid broad general standard. 603 P.2d at 1100.

Similarly, the Timber Harvest Ordinance at issue in this case contains a valid general standard for the exercise of discretion. Contrary to the holding of the district court, the ordinance does not vest the planning and zoning board with the "unlimited power to decide which persons will be ordered to prepare an Environmental Assessment." Order at 8. Rather, the board may order an environmental assessment only when it finds that the planned timber harvest will have a "significant environmental impact" or where the "proposed

and existing harvests, when assessed together, would have significant effects on the environment, public and private property and infrastructure, and the public health, safety and welfare." Timber Harvest Ordinance, Article VI(C)(11). This power is capable of review and is not arbitrary.

Rancho Lobo argues that complying with an order to prepare an environmental statement is expensive and burdensome. This argument has no bearing on whether the provision requiring an environmental assessment is a valid delegation of legislative authority. The district court erred when it concluded the Timber Harvest Ordinance provision that requires preparation of an environmental assessment was not properly promulgated under the county's zoning authority.

We REVERSE the district court's conclusion that the Timber Harvest Ordinance is preempted by the Forest Conservation Act. We also REVERSE the district court's conclusion that the ordinance's provision for requiring an environmental assessment constituted an invalid delegation of legislative authority. We REMAND for further proceedings. Appellee's motion to certify question of state law is DENIED.

APPENDIX C

US District Court
District of New Mexico
Digital File Stamp

[Filed March 2, 2001]

Case:	**00cv00925**
Title:	**Rancho Lobo Ltd v. DeVargas et al.**
Document Type:	**Final Order**
Document Number:	**46**
Description:	**FINAL ORDER by Chief Judge James A. Parker Partial summary judgment declaring Rio Arriba County Timber Ordinance invalid.**
Total Pages:	**1**
Exhibits/Attachment:	**0**
Court Signature:	47 9a 1a d6 ce 3e b5 3[illegible] c0 cf 84 78 37 6d 65 26 c0 ec ff 74 43 fb b7 84 bc 5d c7 03 35 8c 43 ea ea e8 a3 52 bf 7c 03 a9 da d1 c2 ab cb c8 3a 4f 06 6e d2 3b b7 b6 a2 ca d5 53 9f 7f 42 c7 9b 37

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ. No. 00-925 JP/DJS

[Filed March 2, 2001]

RANCHO LOBO, LTD., a Texas limited partnership, Plaintiff,	)
vs.	)
ANTONIO DEVARGAS, PATRICIO ANTONIO, GILBERT CHAVEZ, MOISES MORALES, ALFREDO MONTOYA, NELSON CORDOVA, in their Individual and Official capacities, and THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF RIO ARRIBA, Defendants.	)

PARTIAL SUMMARY JUDGMENT

Having granted the Plaintiff's Motion for Summary Judgment on the Validity of the Timber Ordinance (Doc. No. 29) and denied the Defendants' Cross Motion for Summary Judgement on the Validity of the Timber Harvest Ordinance (Doc. No. 31) by a Memorandum Opinion and Order entered contemporaneously with this partial summary judgment,

IT IS HEREBY DECLARED that the Rio Arriba County Timber Harvest Ordinance is invalid because it is preempted by statutes of the State of New Mexico.

/s/_____
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ. No. 00-925 JP/DJS

[Filed March 2, 2001]

RANCHO LOBO, LTD., a Texas limited partnership, Plaintiff,	)
vs.	)
ANTONIO DEVARGAS, PATRICIO ANTONIO, GILBERT CHAVEZ, MOISES MORALES, ALFREDO MONTOYA, NELSON CORDOVA, in their Individual and Official capacities, and THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF RIO ARRIBA, Defendants.	)

MEMORANDUM OPINION AND ORDER

On November 2, 2000, the Plaintiff filed a Motion for Summary Judgment on the Validity of the Timber Ordinance (Doc. No. 29). On November 17, 2000, the Defendants filed

a Cross Motion for Summary Judgement on the Validity of the Timber Harvest Ordinance (Doc. No. 31). Having reviewed the briefs and relevant law, I find that Plaintiff's motion for summary judgment should be granted and the Defendants' motion for summary judgment should be denied.

A. Background

On February 11, 2000, the Plaintiff applied for and received a commercial timber harvest permit from the Forestry Division of the New Mexico Energy, Minerals and Natural Resources Department. The Plaintiff planned the timber harvest to minimize the fire hazard presented by an overgrown forest and to maximize the habitat for the natural vegetation, elk, deer, and bear. On March 6, 2000, Defendant DeVargas, an assistant planner and the timber harvesting officer for the Rio Arriba County Planning and Zoning Department, notified the Plaintiff that it must apply for and receive a timber harvest permit from Rio Arriba County (County) in order to proceed with the timber harvest. The Plaintiff refused to apply for a County timber harvest permit and filed this lawsuit.

The Plaintiff's complaint alleges that the Rio Arriba County Timber Harvest Ordinance (County Ordinance) violates due process, constitutes an unconstitutional taking, and deprives the Plaintiff of its contractual rights, all in violation of the Fifth and Fourteenth Amendments of the United States Constitution and the New Mexico Constitution. The complaint also alleges that the County Ordinance is invalid because state law preempts the County Ordinance. The Plaintiff asks the Court in its complaint to declare the County

Ordinance invalid and enter a permanent injunction prohibiting the County from enforcing the County Ordinance. The Plaintiff further asks for an award of compensatory and exemplary damages.

The Plaintiff in its motion for summary judgment requests that the Court find as a matter of law that the County Ordinance is invalid. In the alternative, the Plaintiff asks the Court to certify the issue of the validity of the County Ordinance to the New Mexico Supreme Court for resolution. The Defendants in their motion for summary judgment request that the Court uphold the County Ordinance.

B. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). When applying this standard, the Court examines the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Applied Genetics Intl, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Only then does the burden shift to the non-movant to come forward with evidence showing that there is a genuine issue of material fact. *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887,891 (10th Cir. 1991). An issue of material fact is genuine if a reasonable jury could return a verdict for the non-movant. *Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir. 1996) (citation omitted). The non-moving party may not

avoid summary judgment by resting upon the mere allegations or denials of his or her pleadings. *Bacchus Indus., Inc.*, 939 F.2d at 891.

C. Discussion

Before addressing the merits of the motions for summary judgment, I will address the issue of whether it is appropriate to certify the question of the validity of the County Ordinance to the New Mexico Supreme Court. Under Rule 12-607, NMRA 1998 and NMSA 1978, §39-7-4 (1997), certification of a question to the New Mexico Supreme Court is appropriate if there are no controlling New Mexico appellate decisions, statutes, or constitutional provisions concerning the question. I believe that there is sufficient controlling New Mexico law to allow me to decide the validity question without resorting to mere speculation on how New Mexico courts would decide the question. I, therefore, find that certification of the validity question to the New Mexico Supreme Court is unnecessary.

The substantive issues raised in the motions for summary judgment are as follows: whether the County Ordinance and its permit procedure conflict with state law; whether the County Ordinance is preempted expressly or impliedly by state law; whether the County Ordinance is an authorized zoning ordinance; and whether the County validly exercised its general welfare powers in enacting the County Ordinance.[1]

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[1] The Plaintiff asks the Court not to consider Exhibit 3 to Defendant Rio Arriba's Reply in Support of its Motion for

1. Whether the County Ordinance and its permit procedure conflict with state law.

The Plaintiff argues that the County Ordinance's greater restrictions on clear cutting and extensive permit process conflict with the New Mexico Forest Conservation Act (State Act), NMSA 1978, §§68-2-1 to 68-2-25. The Plaintiff contends that the State Act governs as a matter of law in that situation. In New Mexico, an ordinance is presumed to be valid and the person attacking the ordinance has the burden of showing that the ordinance is invalid. *See, e.g., City of Albuquerque v. Jackson,* 101 N.M. 457, 459, 684 P.2d 543, 545 (Ct. App. 1984). When an ordinance and a statute conflict, the law of the sovereign controls. *Casuse v. City of Gallup,* 106 N.M. 571,573,746 P.2d 1103, 1105 (1987). However, "an ordinance is not necessarily invalid simply because it provides for greater restrictions than state law. Rather, the tests are whether the stricter requirements of the ordinance conflict with state law, and whether the ordinance permits an act the general law prohibits, or prohibits an act the general law permits." *Incorporated County of Los Alamos v. Montoya,* 108 N.M. 361,365, 772 P.2d 891,895 (Ct. App.), *cert. denied,* 108 N.M. 273, 771 P.2d 981 (1989).

Summary Judgment on the Validity of the Timber Harvest Ordinance (Doc. No. 38). Since I have already stricken that exhibit, it will not be considered. *See* Order (Doc. No. 42), filed Jan. 29, 2001.

Article VI (C)(1) of the County Ordinance prohibits clear cutting unless a variance is obtained. Moreover, Art. VI (C)(3) of the County Ordinance describes the residual stand of trees that must be left after a timber harvest. The State Act, on the other hand, says that nothing in the State Act "shall prevent a landowner hereafter from converting forest vegetative types to nonforest vegetative types for such purposes as range, wildlife habitat, farming, surface mining or subdivision development; provided, however, any slash resulting from such conversion shall be treated in a manner that will minimize the spread of forest fires and the possibility of insect epidemic." In other words, the State Act allows clear cutting while the County Ordinance prohibits clear cutting if a variance is not obtained. I, therefore, find that the undisputed facts show that the County Ordinance's clear cutting provisions conflict with the State Act's allowance of clear cutting.

To obtain a timber harvest permit under the County Ordinance, the County Ordinance requires a pre-application conference; a Timber Harvest Plan prepared by a professional forester or qualified timber operator; erosion control and regeneration plans prepared in compliance with the Water Quality Protection Guidelines for Forestry Operations in New Mexico; riparian buffer zones; terrain management and erosion control measures; well-designed roads and drainage systems in compliance with the Water Quality Protection Guidelines for Forestry Operations in New Mexico; no timber harvests on slopes of 40 percent or more, or in unstable soils unless a variance is granted; a fire protection plan; protection of archeological, historic and cultural resources; abatement of noise, dust, smoke, and traffic; consideration of compatibility

with adjacent land uses; possible preparation of an Environmental Assessment if the timber harvest has significant effects on the environment, public and private property and infrastructure, and the public health, safety, and welfare; and public meetings. *See* Art. VI of County Ordinance. The regulations promulgated under the State Act require that a timber harvest permit applicant prepare a forest regeneration plan, prepare a plan for the method of harvest and treatment of skid trails and slash on excessive slopes, and provide for water bars and reseeding. 19 NMAC 20.2.8; 20.2.10. The County Ordinance's permitting process clearly has more extensive requirements to acquire a timber harvest permit than the regulations promulgated under the State Act require. Hence, the undisputed facts indicate that the County Ordinance's permitting process conflicts with the State Act's permitting process. In sum, as a matter of law, the State Act's clear cutting provision and relatively simple permitting process conflict with and govern over the County Ordinance's general prohibition against clear cutting and its complex permitting process.

2. Preemption of the County Ordinance by the State Act.

The Plaintiff also argues that the County Ordinance is invalid because the State Act expressly or impliedly preempts the County Ordinance. A county's ability to regulate in an area may be preempted expressly by the language of a statute. *San Pedro Mining Corp. v. Board of County Commissioners of Santa Fe County,* 1996-NMCA-002 ¶9, 121 N.M. 194, *cert. denied,* Table No. 23,364 (1996). "A local government is presumed to retain the power to exercise its normal

authority over an activity, so the intention of the legislature to preempt local control must be clearly stated if express preemption is to result." *Id.* That clear legislative intention "to preempt a governmental area should be sufficient without necessarily stating that affected [local governmental entity] must comply and cannot operate to the contrary." *Casuse,* 106 N.M. at 573,746 P.2d at 1105 (citation omitted).

Here, the State Act states that the Forestry Division "is authorized to make and enforce rules and regulations not in conflict with any now in force as it deems necessary for the application of commercial forest practices within the state." NMSA 1978, §68-2-16 (1959). The Forestry Division is likewise "authorized to enforce all laws, rules and regulations relating to all forested, cutover or brush lands lying within the state under the following circumstances: ... B. logging and timber operations and practices... [and] D. conservation of commercial forest lands and products." NMSA 1978, §68-2-14 (1959)(emphasis added). Furthermore, "the forestry division shall enforce and administer all laws and regulations relating to forestry on lands within the state...." NMSA 1978, §9-5A-4 (C) (1987)(emphasis added). In addition, "[t]he state shall have the responsibility for prevention and suppression of forest fires on all nonfederal, nonmunicipal lands in the state." NMSA 1978, §68-2-8 (1967) (emphasis added). The statutory language clearly indicates the legislature's intent to expressly preempt local governmental entities from regulating timber harvests. Accordingly, as a matter of law, the County Ordinance is invalid on that basis. Having found express preemption, there is no reason for me to analyze the implied preemption argument.

3. Use of the County's Authority to Zone

The Plaintiff further argues that the County Ordinance is not authorized under the County's power to enact zoning ordinances. The Plaintiff complains that the County Ordinance does not provide for special districts as required by NMSA 1978, §3-21-1(B) (1965). "Zoning is defined as 'governmental regulation of the uses of land and buildings according to districts or zones.'" *Miller v. City of Albuquerque,* 89 N.M. 503, 505, 554 P.2d 665, 667 (1976)(citation omitted). Contrary to the Plaintiff's contention that there must be special zoning districts in order to establish a zoning ordinance, a district or zone can be county-wide as in this case. *See Board of County Commissioners of San Miguel County v. City of Las Vegas,* 95 N.M. 387, 389, 622 P.2d 695, 697 (1980).

The Plaintiff asserts next that the County Ordinance's provision for an Environmental Assessment is discretionary in nature and so cannot be uniformly applied to timber harvest permit applicants as required by NMSA 1978, §3-21-1(B). *City of Santa Fe v. Gamble-Skogmo, Inc.,* 73 N.M.410, 417, 389 P.2d 13,18 (1964)(citations omitted) stated that:

> It is settled that a legislative body may not vest unbridled or arbitrary power in an administrative agency but must furnish a reasonably adequate standard to guide it. Standards required to support a delegation of power by the local legislative body need not be specific. Most decisions hold that broad general standards are permissible "so long as

> they are capable of a reasonable application and are sufficient to limit and define the Board's discretionary powers."

The County Ordinance states that "[t]he Planning and Zoning Department may order an applicant to prepare an Environmental Assessment pursuant to this ordinance upon a finding that the proposed and existing harvests, when assessed together, would have significant effects on the environment, public and private property and infrastructure, and the public health, safety and welfare." Art. VI (C)(11)(c) (emphasis added). This provision gives the Planning and Zoning Department unlimited power to decide which persons will be ordered to prepare an Environmental Assessment. The Environmental Assessment provision was, therefore, not properly promulgated under the County's zoning authority.

The Plaintiff also complains that the social considerations found in the County Ordinance are outside the scope of the zoning authority granted by NMSA 1978, §3-21-1(A) (1965). "To be within the authorized purposes the zoning ordinance must bear some reasonable relationship to the general welfare." *Gamble-Skogmo, Inc.*, 73 N.M. at 413, 389 P.2d at 15. "'The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.'" *Temple Baptist Church, Inc. v. City of Albuquerque*, 98 N.M. 138, 14344, 646 P.2d 565,560-61 (1982)(quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954)). The Plaintiff argues that the County

Ordinance's purpose "to preserve local customs, culture and traditions" is not within the scope of the County's zoning authority. *See* Art. II of the County Ordinance. The Plaintiff, however, has not presented any evidence which would create a question of material fact concerning whether the County Ordinance's purposes are not reasonably related to the general welfare. I, therefore, find that the preservation of "local customs, culture and traditions" is reasonably related to the general welfare.

4. Whether the County validly exercised its general welfare powers in enacting the County Ordinance.

Finally, the Plaintiff argues that the County did not validly exercise its general welfare powers in enacting the County Ordinance. NMSA 1978, §4-37-1 (1975) grants counties general welfare or police powers. In order to enact a valid ordinance under the general welfare or police powers, the ordinance must be "'reasonably necessary to preserve the public health, safety, morals or general welfare.'" *City of Hobbs v. Biswell,* 81 N.M. 778,780, 473 P.2d 917, 919, *cert. denied,* 81 N.M. 772, 473 P.2d 911 (1970)(citation omitted). Section 4-37-1 also states that counties can only discharge those powers if doing so is "not inconsistent with statutory or constitutional limitations placed on counties." In this case, there is a question of fact as to whether the silvicultural principles and methodologies set forth in the County Ordinance are sound and would actually benefit the environmental health of the County's forested lands. Notwithstanding this question of fact, as discussed *supra,* portions of the County Ordinance are inconsistent with the

State Act. Those portions of the County Ordinance are invalid.

D. Conclusion

There is no need to certify to the New Mexico Supreme Court the question of whether the County Ordinance is valid. Although some portions of the County Ordinance conflict with the State Act and other portions are not authorized under the County's exercise of its zoning and general welfare powers, I find that the entire County Ordinance is expressly preempted by the State Act. Consequently, the County Ordinance is invalid.

IT IS ORDERED that Plaintiff's Motion for Summary Judgment on the Validity of the Timber Ordinance (Doc. No. 29) is granted and Defendants' Cross Motion for Summary Judgement on the Validity of the Timber Harvest Ordinance (Doc. No. 31) is denied.

/s/ _____
Chief United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 01-2196

[Filed September 13, 2002]

RANCHO LOBO LTD, a Texas limited partnership, Plaintiff-Counter-Defendant- Appellee,	)
v.	)
ANTONIO DEVARGAS, et al., Defendants-Counter-Claimants-Appellants.	)

Before EBEL, McKAY and BRISCOE, Circuit Judges.

ORDER

Governor Gary E. Johnson's motion for leave to file as amicus curiae in support of appellee's petition for rehearing en banc is granted. The brief shall be filed as of the date of this order.

Entered for the Court
PATRICK FISHER, Clerk of Court

By: _____
Deputy Clerk

APPENDIX F

No. 01-2196

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RANCHO LOBO, LTD.,
a Texas limited partnership,
Plaintiffs-Appellees,

ANTONIO DEVARGAS, PATRICIO ANTONIO, GILBERT CHAVEZ, MOISES MORALES, ALFREDO MONTOYA, NELSON CORDOVA, in their individual and official capacities, and THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF RIO ARRIBA,
Defendants-Appellants.

On appeal from the United States District Court
for the District of New Mexico
Honorable James Parker,
United States District Judge, Presiding

GOVERNOR GARY E. JOHNSON'S
BRIEF AS *AMICUS CURIAE* IN SUPPORT
OF PETITION FOR REHEARING *EN BANC*

Respectfully Submitted,

Matthew Hoyt
General Counsel
OFFICE OF THE GOVERNOR
State Capitol Bldg.
Santa Fe, NM 87503
(505) 827-3000
Attorney for *Amicus Curiae*

STATEMENT REGARDING ORAL ARGUMENT

Counsel for the Governor does not request oral argument.

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Report, Southwest Area Wildland Fire Operations, *Fire Information* (Sept. 9, 2002) 2

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INTEREST OF THE AMICUS

Gary E. Johnson, as Governor of the State of New Mexico, submits this brief *amicus curiae* in support of Plaintiff-Appellees. The Governor's interest as *amicus* stems from his authority and duty as the supreme executive of the State of New Mexico, charged by the Constitution of the State of New Mexico to "take care that the laws shall be faithfully executed." N.M. Const., Art. V, § 4. Those laws provide that the state's Energy, Minerals, and Natural Resources Department ("EMNRD"), a cabinet-level agency within the executive branch of New Mexico state government, is charged, *via* the State Forester, with overseeing the management of all the state's public and private forest lands.[1] NMSA 1978, § 68-2-3 (1987); NMSA 1978, § 68-2-8 (1979). The Governor provides for the appointment of the Secretary of EMNRD, who in turn appoints the State Forester. NMSA 1978, § 9-5A-7 (1987); § 68-2-3.

Since his election in 1994, and continuing since his re-election in 1998, Governor Johnson has continually faced the threat of wildfire to his state. Most notable was the Cerro Grande fire of May 4-8 2000, a 47,650-acre wildfire that started as a controlled burn on the Bandelier National Monument near Los Alamos, New Mexico. *See* United States Department of the Interior, National Interagency Fire Center, *Cerro Grande Prescribed Fire Investigation* (May 18, 2000). This fire destroyed 235 homes in the Los Alamos/White Rock area and caused the evacuation of 18,000 people. *Id.*

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[1] This point is discussed in greater detail *infra*.

New Mexico remains in the throes of an extremely severe hydrologic drought, exacerbating the level of potential fire danger to the citizens of the state this fire season. *See* Report, National Weather Service, *Drought Status for July 17, 2002* (July 17, 2002) < http://weather.nmsu.edu/drought/july2002.pdf >. While New Mexico has fortunately been spared much of the devastation it faced in previous summers, sizeable wildfires continue to burn throughout the state even though climatic patterns normally keep fires in check this time of year. *See* Report, Southwest Area Wildland Fire Operations, *Fire Information* (Sept. 9, 2002) < http://www.fs.fed.us/r3/fire/ >. Due in large part to this extreme fire danger and based upon recommendations from the New Mexico Drought Task Force, on April 26, 2002 the Governor declared a statewide drought disaster in New Mexico pursuant to the Disaster Relief Act, NMSA 1987, § 6-7-1 *et seq.* (1999). *See* Executive Order 02-19, attached hereto as Exhibit 1.

The Governor's concern over the Court's decision in the above-captioned matter stems from this wildfire threat. While the Governor respects and supports the home-rule authority of counties to oversee local matters, he submits that the Court's ruling could have a profoundly negative effect on the state's ability to manage and control fires on forest lands in the state, and in turn prevent state officials from protecting the lives and property of the citizens they are duty bound to serve.

ARGUMENT

I. Introduction

Fed. R. App. P. 35.1 mandates that *en banc* consideration of an appellate court's panel decision "... is an extraordinary procedure intended to focus the entire court on an issue of exceptional public importance." The Governor submits to the Court that its decision in the above-captioned matter falls squarely into such a scenario- although seemingly limited to the facts and circumstances at bar, the Court's ruling could have profound implications on the ability of the state to manage and protect not only the state's forests from wildfire, but also the persons and property who live within those forests or in the "wildland/urban interface", those populated areas immediately adjacent to forest lands. As more fully explained below, New Mexico law stands firmly behind the proposition that, notwithstanding the home-rule provision of the New Mexico Constitution, county interests remain subservient to the state's interest in preserving the public health, safety and welfare of its citizens statewide. *See infra.*

II. The Laws of New Mexico Explicitly Place the Authority to Manage Fire Prevention and Suppression on Non-Federal, Non-Municipal Forest Lands Under the Exclusive Province of the State.

Notwithstanding the question of whether the provisions of the state Forest Conservation Act relating to timber harvesting expressly or implicitly preempt the Rio Arriba County ordinance at issue, the nearly ubiquitous authority provided to the state to control wildland fire in the state's forests is clearly set forth in New Mexico statutory law.

NMSA 1978, § 68-2-8 mandates that "[t]he state shall have the responsibility for prevention and suppression of forest fires on all nonfederal, nonmunicipal lands in the state" including public or private lands in counties. NMSA 1978, § 68-2-8. [Emphasis added.] Moreover, "the police power of the state shall extend to such control of private forest lands as shall be necessary for the prevention and suppression of forest fires [and] the state forester and his agents shall have unrestricted access to private and state lands, including the use of roads and trails, in order to carry out forest fire prevention and suppression work[.]" § 68-2-8 (A), (B). As well, "[t]he [forestry] division is authorized to make and enforce rules and regulations not in conflict with any law now in force as it deems necessary for the prevention and suppression of forest or brush fires[.]"[2] NMSA 1978, § 68-2-16 (1979).

An example of the state's application of these laws occurred this past June, when the state forester issued an order providing for statewide fire restrictions on all non-municipal, nonfederal lands within the state. *See* State Forester Order 0203, attached hereto as Exhibit 2. The order included prohibitions relating to timber harvesting. *Id.*

State Forester Order 02-03 provides an illustration of not only the far-reaching powers exercised by the state in suppressing and preventing wildland fires, but also the wide range of activities fire suppression efforts implicate - notably,

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[2] Note that the Rio Arriba County ordinance at issue was not in force at the time of this law's passage. *See Rancho Lobo, Ltd. v. De Vargas,* No. 01-2196, slip op. at 3-4 (10th Cir. Aug. 20, 2002)

timber harvesting and thinning. Indeed, the relationship between fire prevention and timber harvesting and thinning is somewhat paradoxical: on one hand, timber harvesting can act as the trigger for a forest fire (e.g., a spark from a chain saw); on the other hand, harvesting and thinning can act as a prophylactic against wildland fire by removing potential fuel. *See, e.g.*, Affidavit of Toby A. Martinez in support of Appellee's Petition for a Rehearing *En Banc* (filed September 5, 2002); New Mexico State University & New Mexico Energy, Minerals and Natural Resources Department, *Creating Wildfire-Defensible Zones* 2-6 (2002); STIHL Corp., *Chain Saw Safety Manual* 24 (2002).

In either case, the state's duty to protect its citizens from wildland fire requires that it have the authority to regulate activities within forests, including timber harvesting, even when such regulations conflict with county ordinances. As more fully explained below, New Mexico law is mindful of the need for state superiority in this arena.

III. The State's Interest in Protecting Citizens from Fire Overrides Local Concerns

By their very nature, municipalities in New Mexico, even though a home - rule state, are creatures of state law in that their authority stems from the state Constitution and statutes. N.M. Const. Art. X, § 6; *cf City of Santa Fe v. Gamble-Skogmo, Inc.* 73 N.M. 410, 413, 389 P.2d 13, 16 (1964) (noting in a case decided before home rule was added to the Constitution that a municipality's powers "are derived solely from the state"); *Apodaca v. Wilson,* 86 N.M. 516, 521, 525 P.2d 876, 881 (1974) (interpreting New Mexico law as providing for legislative limitations on the powers of

municipalities). Article X, Section 6 of the Constitution does not specifically provide for counties; instead, county authority stems from the New Mexico statutes: "[a]ll counties are granted the same powers that are granted municipalities *except* for those powers that are inconsistent with statutory or constitutional limitations placed on counties. [Emphasis added.]" NMSA 1978, § 4-37-1 (1975).

Such a limitation exists under New Mexico law when the police power of the state and the well-being of all of its citizens overrides the concerns of a single county. In *State ex rel. State Highway Commission v. Town of Grants,* 66 N.M. 355, 348 P.2d 274 (1960), plaintiff Highway Commission planned a road reconstruction project on a section of U.S. Highway 66 that ran through the town of Grants. *Id.* at 356, 275. The commission alleged that town officials had assured the commission that the town's water and sewer pipelines were buried to sufficient depth so as to allow the commission to complete the project without having to replace the lines. *Id.* Despite the alleged assurances, the commission discovered during the course of the project that the lines were not deep enough, and therefore required relocation. *Id.* The town refused to relocate the lines, so the commission did so and then sued the town to collect the $40,763.76 spent moving the lines. *Id.*

The Commission asserted to the court that the town had a duty to relocate its sewer and water lines when a state entity deemed it necessary to provide for a safe and adequate highway for the traveling public, *Id.* at 359, 278. In finding for the commission, the Supreme Court first examined the laws as they relate to private utility property:

> The rationale of all of the cases on this particular subject is that the police power of the state is paramount, and that in the proper exercise thereof there may be a limitation in the use of or complete destruction of private property in order to advance public welfare without the necessity of compensation to the owner. Therefore, although utilities are permitted to locate their facilities within the public way and thereby obtain certain rights for limited purposes, these fights are subordinate to the fights of the traveling public and are subject to a reasonable exercise of the police power.

66 N.M. at 359, 348 P.2d 278.

The Court then examined whether a different rule applied where the utility is municipally owned. It looked first at the commission's enabling provision in the Constitution, Article V, Section 14: "'The state highway commission is empowered and charged with the duty of determining all matters of policy relating to the design, construction, location and maintenance of state highways and public roads.'" *Id.* at 360, 279, *quoting* N.M. Const., Art. V., § 14 (amended 1967). Additionally, the court noted that the statutes authorized the commission to regulate pipelines and other utility facilities. *Id.* The Court then noted that neither of these authorities "made any distinction as to ownership of public utilities--that is, privately or public owned ... [h]owever, there is no question in New Mexico but that the title to the streets is in the first instance in the state. [Citations omitted.]"

More important to the court's ruling in favor of the commission that these enabling act was the long line of jurisprudence the Court cited providing that a state's interest in protecting the health, safety and welfare of its motorists overrides local interests: "It is fundamental that the right of the state to provide roads for the use of its citizens and for the public general is a sovereign right." *Id.* at 361,280, *quoting City of Chardon v. State,* 214 N.W. 297, 299 (Neb. 1927); and:

> 'So far as its streets are concerned, a city is only an agency of the State, and whether it has the fee or only an easement in the street it holds them in trust for the people of the entire State. So far as their use for street purposes is concerned, every citizen of the State has an equal right (Citations). The right of the people in the streets and highways of the State, whether inside or outside the municipalities thereof, is a paramount right. The municipality cannot lawfully perform any acts itself nor permit others to do so or perform anything in derogation of this right of the sovereign people, nor may the city permit any uses or encroachments which are unreasonable and against the public interest (Citations).'

Id. at 360, 279, *quoting People's Gas Light & Coke Co. v. City of Chicago,* 109 N.E.2d 777, 781 (Ill. 1953).

The holding of *Grants* easily translates to the matter before this Court: where every citizen of the state has a right to safety from wildland fire danger, and where the State is the

principal defender of this right, an individual county cannot impede the State's duty through local legislation or action. Because the Court's decision in this matter could lead to just such a result, the Governor urges this Court to empanel *en banc* and reconsider its decision.

CONCLUSION

For the foregoing reasons, the Governor respectfully requests that the Court empanel itself *en banc* and reconsider the decision rendered in the above-captioned matter.

Respectfully submitted,

GOVERNOR GARY E. JOHNSON

By /s/_____

Matthew R Hoyt
Office of the Governor
State Capitol- Fourth Floor
Santa Fe, NM 87503
(505) 827-3000

CERTIFICATE OF DELIVERY TO COURT AND PARTIES

Pursuant to Fed. R. App. P. 25(d)(2), I hereby certify that, on this 10th day of September, 2002, the original and the requisite number of true and correct copies of the foregoing motion were placed for shipment by Federal Express for overnight delivery to:

Patrick Fisher, Clerk
United States Court of Appeals for the Tenth Circuit
Byron White U.S. Courthouse
1823 Stout Street
Denver, Colorado 80257

Further, Pursuant to Fed. R. App. P. 25(d)(1), I hereby certify that, on this 10th day of September, 2002, the requisite number of true and correct copies of the foregoing brief were placed for shipment by first-class mail to the following counsel:

Simeon Herskovits, Esq.
Grove T. Burnett, Esq.
Western Environmental Law Center
Post Office Box 1507
Taos, New Mexico 87571-1507

John R. Polk, Esq.
4550 Eubank NE, Suite 108
Albuquerque, New Mexico 87111

/s/ _____
Matthew Hoyt, Esq.

OFFICE OF THE GOVERNOR
State Capitol
Santa Fe, New Mexico 87503
(505) 827-3000

Exhibit 1

Gary E. Johnson
Governor

EXECUTIVE ORDER 02-19

WHEREAS, portions of New Mexico have experienced mild drought conditions since early in 2001; and

WHEREAS, drought conditions began to intensify during last fall and particularly during the extremely dry winter of 2001-2002, with large portions of New Mexico now experiencing severe to extreme drought conditions; and

WHEREAS, total statewide reservoir levels are at their lowest point in the last 20 years; and

WHEREAS, the National Weather Service and National Conservation Service's Combined Snowmelt Runoff Forecast is one of the top five lowest in the past 45 years; and

WHEREAS, present composite snow pack levels for each basin in the state range from zero to 34 percent of the 1971 through 2000 average; and

WHEREAS, the present combination of low reservoir levels and projected snowmelt runoff forecasts have not been

this low for the state since the drought of mid-1970s; and

WHEREAS, runoff into some major streams is expected to decrease to only 2 percent of normal; and

WHEREAS, already critical fire conditions are expected to worsen; and

WHEREAS, Interstate Compact delivery obligations may be put in jeopardy by the drought; and

WHEREAS, compliance with the Endangered Species Act may be compromised by the drought; and

WHEREAS, the New Mexico Drought Monitoring Workgroup has recommended that Warning or Emergency Drought Conditions have been met in the majority of the state's eight climate divisions; and

WHEREAS, the Drought Task Force has advised the Governor that present drought conditions are not expected to abate in the near future and are expected to worsen; and

WHEREAS, the chair of the state's Drought Task Force, by letter of April 22, 2002, requested that the Governor declare a state of emergency in New Mexico due to drought conditions; and

WHEREAS, extraordinary measures are necessary to protect public health, ensure public safety and well-being, and provide for the economic stability of the State.

NOW, THEREFORE I, Gary E. Jolmson, Governor of the State of New Mexico, by virtue of the authority vested in me by the Constitution and Laws of the State of New Mexico, do hereby declare a state of emergency due to drought conditions statewide. I hereby order the activation of the New Mexico Drought Plan to assess conditions, evaluate impacts, and make recommendations as to appropriate response and mitigation actions to be taken. Pursuant to and in accordance with Sections 6-7-1 through 6-7-3, NMSA 1978, I hereby authorize all executive branch agencies of state government to apply for and if eligible and qualified receive emergency funds as required to carry out the New Mexico Drought Plan and for such other disaster relief related to drought as set forth in this Executive Order. Such funds shall be released upon approval by the Office of the Governor based on recommendations by the Drought Task Force.

Attest:

/s/ _____
Rebecca Vigil-Giron
Secretary of State

DONE AT THE EXECUTIVE OFFICE
THIS 26th DAY OF APRIL, 2002.

WITNESS MY HAND AND THE GREAT SEAL OF THE STATE OF NEW MEXICO.

/s/ _____
Gary E. Johnson
Governor

Brief as Amicus Curiae

NEW MEXICO ENERGY, MINERALS and NATURAL RESOURCES DEPARTMENT
Gary E. Johnson
Governor
Betty Rivera
Cabinet Secretary

02-03

SMOKING, CAMPFIRE, FIREWORKS AND OPEN FIRE

RESTRICTIONS
FOR
THE STATE OF NEW MEXICO

Exhibit 2

Due to the lack of precipitation, high winds and low humidity, wildland fuels in all of New Mexico are at a hazardous level for burning. Fire incidents for all wildland fire agencies are increasing daily. Pursuant to New Mexico Statutes Annotated, Section 68-2-16, and other sections of the Forest Conservation Act, Section 68-2-1 to 68-2-25 NMSA 1978, and 19 NMAC 20.3; Restrictions for Fire Prevention, the Energy, Minerals and Natural Resources Department, Forestry Division has placed the following restrictions on non-municipal and non-federal lands throughout the State of New Mexico.

SMOKING, CAMPFIRE, FIREWORKS, OPEN FIRE RESTRICTIONS:

Smoking is restricted to designated areas, within structures, or within vehicles equipped with ashtrays while on paved or surfaced roads.

Open fires including campfires and fireworks are prohibited. An exception is granted to the above where cooking or heating devices use kerosene, white gas or propane as a fuel in an improved camping area that is cleared of flammable vegetation for at least 30 feet or has a water source. The State Forester is also allowing exceptions for charcoal grills and wood and coal stoves within yards associated with a residence or on the premises of a business. The State Forester is allowing exceptions to the ban on fireworks where they are a part of a public exhibit approved by the local fire department. New Mexico State Parks Division may determine which areas within their parks are designated for campfires. For information on this contact the local State Park Manager or visit the website at *http://www.nmparks.com/.*

Open burning, i.e., burning of cropland, fields, rangeland, debris burning, slash piles, prescribed burning or weed burning, is prohibited.

The State Forester grants an exception to the open fire restrictions for the planned burning of cropland and fields in Chavez, Curry, DeBaca, Dona Ana, Eddy, Lea, and Roosevelt counties when the following conditions are met:

1. The cropland or fields must be irrigated. This exception will not apply to non-irrigated cropland,

fields or rangeland;

2. Burning must be done with adequate planning;

3. Adequate personnel must monitor and control the burn to assure that it will not become an uncontrolled fire;

4. The burn area will be secured from becoming uncontrolled at the end of daily operations; and

5. At the beginning of each day, before ignition, the person responsible for the burn must notify the local government fire department responsible for fire protection and follow all local burning guidelines.

All fuelwood cutting, timber-harvesting and thinning activities are prohibited on days of extreme "red flag" fire danger. Red flag fire danger will be determined based on forecasts published the previous day by 6:00 pm on the Southwest Area Fire Operations website: *http://www.fs.fed.us/r3/fire,* Fire Weather, National Weather Service Fire Weather Forecast for New Mexico. Local red flag conditions exist when sustained wind speeds are 20 miles per hour or greater and relative humidity is 15% or less. Red flag information is also available by calling the local Forestry Division office.

On non-red flag fire danger days, fuelwood cutting, timber-harvesting and thinning activities are prohibited from operating during the most dangerous burning period between 10:00 am to 8:00 pm. Additionally, the following requirements must be met.

1. At all times, equipment using combustible fuel must have a properly functioning spark arrester and a fire extinguisher and shovel must be immediately available for each piece of operating equipment.

2. Chainsaws may not be operated between 10:00 am to 8:00 pm, except they may be used until 2:00 pm on landings cleared to mineral soil.

3. Loading is authorized to continue until 2:00 pm on landings cleared to mineral soil.

4. Operations on mineral soil involving road excavation, watering, grading, surfacing and equipment maintenance may continue between 10:00 am and 8:00 pm.

5. A patrol must be posted on site for at least two hours after all equipment operations are completed. The patrol must be able to detect within five minutes, fires that may originate at the site of the equipment operation and be able to report a fire to the responsible protection agency within 15 minutes of detection.

Use of other equipment in forested areas for a purpose other than fuelwood cutting, timber-harvesting and thinning is prohibited from operating during the most dangerous burning period between 10 am to 8 pm. The State Forester grants an exception when:

1. At all times, equipment using combustible fuel has a properly functioning spark arrester and a fire

extinguisher and shovel are immediately available for each piece of operating equipment.

2. A patrol is posted on site for at least two hours after all equipment operations are completed. The patrol must be able to detect within five minutes, fires that may originate at the site of the equipment operation and be able to report a fire to the responsible protection agency within 15 minutes of detection.

The State Forester may allow exceptions to the above upon receiving a written request for an exemption and granting subsequent approval in writing.

An exception from any of these restrictions does not relieve a person from any civil or criminal liability associated with an uncontrolled fire, including costs associated with wildland fire suppression.

These restrictions become effective at 8:00 a.m., Wednesday, June 19, 2002 and will remain in effect until rescinded.

DONE THIS 18 DAY JUNE, 2002

/s/_____
Toby A. Martinez, State Forester
Forestry Division

Respectfully submitted,

GOVERNOR GARY E. JOHNSON

Brief as Amicus Curiae

By: /s/ _____

Matthew R Hoyt
Office of the Governor
State Capitol- Fourth Floor
Santa Fe, NM 87503
(505) 827-3000

CERTIFICATE OF DELIVERY TO COURT AND PARTIES

Pursuant to Fed. R. App. P. 25(d)(2), I hereby certify that, on this 10th day of September, 2002, the original and the requisite number of true and correct copies of the foregoing motion were placed for shipment by Federal Express for overnight delivery to:

Patrick Fisher, Clerk
United States Court of Appeals for the Tenth Circuit
Byron White U.S. Courthouse
1823 Stout Street
Denver, Colorado 80257

Further, Pursuant to Fed. R. App. P. 25(d)(1), I hereby certify that, on this 10th day of September, 2002, the requisite number of true and correct copies of the foregoing brief were placed for shipment by first-class mail to the following counsel:

RIO ARRIBA COUNTY TIMBER HARVEST ORDINANCE

1998-05

Exhibit 1

RIO ARRIBA COUNTY ORDINANCE No. 1998-05

Article I. Title

This ordinance shall be known as the "Rio Arriba County Tinaber Harvest Ordinance."

Article II. Purpose

This ordinance is intended to protect, maintain and restore fully functional forests and streams, rivers, watersheds and acequias while permitting the harvest of forest goods; to protect against immediate and long range threats to the quality of the Rio Arriba County's water; to preserve local customs, culture and traditions; to preserve the bosques from harm and exploitation; to protect landowners and the property value of timberlands; to encourage the location of compatible uses of land; to promote sustainable logging practices; to encourage logging operations within Rio Arriba County; and to protect the health, safety and welfare of the citizens of Rio Arriba County.

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Article III. Statutory Authority

The Rio Arriba Board of County Commissioners ("board of county commissioners") is authorized to adopt this ordinance pursuant to NMSA 1978 §3-21-1 through 3-21-12 (zoning authority), and NMSA 1978 §4-37-1 through 4-37-9 (powers granted to counties to provide for the welfare of their inhabitants). NMSA 1978 68-2-1 to 50

Article IV. Jurisdiction, Application, Severability and Conflicting Provisions

A. Jurisdiction: This ordinance shall apply to the unincorporated areas of Rio Arriba County. This ordinance does not apply to timber harvests on state and federal lands and Indian reservations. Federal agencies must consider the requirements of this ordinance as well as the Rio Arriba County Design and Development Regulation System. Ordinance No. 1996-01, under the National Environmental Policy Act 42 U.S.C. Section 4321, et. seq. and its implementing regulations at 40 C.F.R. Part 1500. (See Appendix II.)

B. Application: No timber harvest is allowed within Rio Arriba County after the effective date of this ordinance without a valid permit issued by the Rio Arriba County Planning and Zoning Department, except for those harvests which are exempt from the provisions of this ordinance under Article IV. Section (A) below or under Art. VI, Sec. (B) (2).

C. Severability: If any part of or any application of this ordinance is held invalid, the remainder of its application in other instances or persons shall not be affected.

D. Conflicting Provisions: Should a conflict exist between any limitation or requirement within this ordinance or in any other ordinance, regulation or law, the more restrictive limitation or requirement shall prevail.

Article V. Definitions

1. Affected person or interest: Aggrieved person, corporation, partnership or other entity residing in, or owning property in, or doing business in Rio Arriba County who is directly affected by a decision of the Planning and Zoning Department, the Planning Committee or the Board of County Commissioners made with respect to the approval or denial of a THP and who alleges direct injury to their quality of life or property, and who alleges any error or illegality with respect to the approval or denial of a THP.

2. Applicant: Person, corporation, partnership or other entity who is in the process of applying for, or determining the requirement for, a permit. *See* Permittee.

3. Archeological, Cultural and Historic Resources: Structure, place, site or object having archeological, scientific, architectural, historic or other cultural significance as defined by The NMSA 1978 Section § 18-6-3, Cultural Properties Act.

4. Basil area: Cross sectional area of wood on a plane measured at four and one half feet (4.5) above ground and

expressed in square feet per acre.

5. Buffer zones: Area of protection on either side of a stream or other watercourse.

6. Clear cutting: Harvest technique involving the removal of all trees from the area in question (such as one acre or a cutting unit) and leading to the establishment of an even-aged stand composed of naturally or artificially established trees not there before the cutting. This method is appropriate only to those species capable of establishment in conditions of full exposure.

7. Commercial Operator: Person, association, partnership or corporation engaged in the harvest of trees of any species within Rio Arriba County.

8. Community impacts: Effects of a timber harvest that will or may create an identifiable trend or set of conditions on county property or infrastructure or private property or the public health, safety and welfare.

9. Controlled burn: Within the context of these regulations, a fire started intentionally and overseen by a professional forester or timber operator for a definite purpose.

10. County: Rio Arriba County, New Mexico.

11. Culvert: Conduit, usually a corrugated pipe, constructed beneath a road.

12. Cutting Unit: Area of 25 acres or more but not more than 300 acres based on the topography of the area to be

harvested, the number of persons to be engaged in the harvest, transportation, climate, and other relevant factors. Any area larger than 300 acres should be divided into two or more cutting units, each totaling less than 300 acres.

13. Damaged Trees: Trees that are 3 feet and above in height that have been knocked down or damaged to the extent that mortality or serious deterioration will occur, and such trees partially pushed over so as to result in permanent lean and visible damage to the root system, all as a result of the permittee's operation.

14. Deficient Condition: Treatment of slash, utilization of tree stems, erosion prevention re-vegetation, or regeneration action, or any other action not in conformance with this Ordinance.

15. Environmental Assessment: Statement which is supplemental to, and incorporates a Timber Harvest Plan, that identifies the effects of the proposed timber harvest on the environment, public and private property and infrastructure, and the public health, safety and welfare which the Planning and Zoning Department will require under some circumstances in order to make an informed decision regarding the Timber Harvest Permit application.

16. Environmental impacts: Effects of a timber harvest that will or may create an identifiable trend or set of conditions on the historic and natural resources of the county.

17. Erosion control plan: Plan to be included in a Timber Harvest Permit application that shows how the drainage facilities; soil stabilization methods; water crossings;

and roads, skid trails, and yarding areas will be designed and located to minimize surface and mass erosion, gullying, channel erosion and siltation of watercourses.

18. Excessive Slope: Slope of greater than forty percent over a continuous ground distance of eighty yards or more.

19. Exempt harvests: Harvest of 25 acres or less in size by any landowner or landowners on a parcel of land within a calendar year where there are no militating factors due to site-specific conditions or harvesting methods; harvests of dead, dying, diseased trees below 10 % volume of timber per acre with no militating factors due to site-specific conditions or harvesting methods. *See* Militating factors, site-specific conditions, harvesting methods.

20. Exotic species: Species of plant, tree, animal, bird or insect which is not native to a particular area.

21. Fell: To sever or cut a tree at its stump.

22. Forest: Ecosystem dominated by trees.

23. Forest products: Timber products such as raw logs for processing into lumber.

24. Harvest area or permit area: Area of land indicated on an applicant's map submitted with his application, state timber harvest permit or application and approved by the Planning and Zoning Department and attached to the Timber Harvest Permit showing the area where a permittee may lawfully engage in timber harvesting

and related activities.

25. Harvest methods: Process used to cut and remove timber. Common harvest selection methods include:

(A) Seed-tree: a harvest technique which creates conditions similar to that of a clear-cut with the exception of the retention of a limited number of trees (singly or in clumps) within the harvested area to provide seed for a new generation of trees.

(B) Shelterwood: Harvest technique involving a series of cuts with retention of trees within the harvest area for the purpose of: 1) providing seed for a new generation of trees; and 2) altering light conditions on the ground to create appropriate conditions for germination and establishment of seedlings. Shelterwood harvests typically lead to the creation of even-aged stands, although some variations may eventually result in uneven-aged stands.

(C) Selection: Harvest techniques designed to create uneven-aged stands and maintain high forest cover across the landscape. Individual Tree Selection and Group Selection are the two dominant methods utilized within selection systems, and are indicative of the size of canopy gaps created during harvest. The choice of method would be determined by the regeneration requirements of the species in question (i.e., shade, sunlight, moisture, temperature).

(D) Salvage: Harvest of trees that have been or are in imminent danger of being killed or damaged by injurious agencies (fire, insects, disease, etc.) other than competition between trees. *See* Clear cutting, High grading, Thinning.

26. High-grading: Removal of only those trees with the highest economic value.

27. Landing: Place where logs are assembled in or near the forest for further transport, commonly with a change in method and over a long distance.

28. Landowner: Person, entity, or agent owning or having legal control of the use of real property within Rio Arriba County.

29. Legal non-conforming use: In the context of these regulations, an otherwise lawful use of land that which began prior to the effective date of this ordinance and which does not currently comply with applicable permitting or performance standards.

30. Log: 1) to cut and deliver logs or boles; 2) the bole or any segment of the bole (sometimes the thicker branches) of a felled tree.

31. Main Haul Road: Road which by reason of ease of access, column of traffic or other relevant condition is used for or facilitates the hauling of logs or equipment.

32. Management objectives: Property or timber owner's statement of the goal to be achieved by a proposed timber harvest, such as short-term or long-term income, forest regeneration, forest conversion, etc.

33. Militating factors: In the context of these regulations, factors that if present would require a Timber Harvest Permit for an otherwise exempt timber harvest of 25

acres or less: Some examples of militating factors include the presence of slopes of 40 percent grade or greater, unstable soils, and proximity to an acequia or other watercourse.

34. Multiple Cutting Unit Permit: Harvest permit for an area with two or more designated cutting units.

5. Non-timber resources: Watersheds and water courses, soils, vegetation, wildlife, and other natural resources and historic sites or structures present on property where a timber harvest is located.

36. Old growth: Timber stands dominated by mature trees.

37. Permittee: Person. corporation, partnership or other entity who holds a permit. *See* Applicant.

38. Pests: Insects and pathogens that are capable of harming trees, such as dwarf mistletoe, bark beetles, spruce budworms, and root diseases.

39. Planning and Zoning Department: Rio Arriba County Planning and Zoning Department.

40. Planning staff: Director and staff of the Rio Arriba County Planning and Zoning Department.

41. Professional forester: Individual with formal education or appropriate technical or practical training or experience who is engaged in the art, science, business, or profession of forest management.

42. Proof of Ownership: Deed, affidavit or other document with sufficient legal description of real property evidencing a right to possess land upon which a commercial forest species is found.

43. Qualified timber operator: individual who in the course of working on timber harvests over a period of several years for himself or others, and has acquired expertise in logging in accordance with applicable management plans, regulations and permit requirements.

44. Regeneration, Restoration: Human assistance of natural processes to re-establish forest composition, often accomplished through restocking, reseeding and logging road closure.

45. Riparian: Banks and adjacent environment of springs and seeps, watercourses, lakes and wetlands.

46. Second growth: Timber growth that comes up after removal of a mature stand by harvest, fire or other causes.

47. Silviculture: Science of forest management: the theory and practice of controlling forest establishment, composition and growth.

48. Site-specific conditions: Applicable to a given area, such as militating factors or characteristics related to a particular forest location.

49. Skid: Moving of logs or felled trees from the stump to a point of loading..

50. Skid Trail: Road or trail built for log skidding.

51. State Agencies: Including but not limited to NM Department of Environment, NM Highway Department, NM State Engineer, NM Department of Cultural Affairs, NM Energy, Minerals and Natural Resources-Forestry Division.

52. Stand: Contiguous group of trees sufficiently uniform in age class distribution, composition, and structure, and growing on a site of sufficiently uniform quality, to be a distinguishable unit.

53. Steep slopes: Slopes in excess of 40 percent grade.

54. Sustainable forestry: Method of forestry that seeks to balance resource use with long-term availability and productivity. Sustainable forestry seeks to meet the needs of the present, without compromising the ability to meet the needs of the future.

55. Thinning: Timber cut done for purposes of enhancing the growth of the residual tree stand and for fire protection and not for regeneration of the forest. A thinning operation shall not result in the diminishment of existing or residual stands in terms of age class or size class. The primary focus of a thinning operation should be on the removal of the smaller, weaker trees of the stand. Thinning does not include selective harvesting of high-grade trees. See High-grading.

56. Timber harvest: Cutting of trees for market or forest management purposes.

57. Timber Harvest Permit: Written authorization issued by the Rio Arriba County Planning and Zoning Department to harvest timber within the county pursuant to the requirements of this ordinance and under any conditions of approval imposed by the county.

58. Timber Harvest Plan (THP): Statement of a timber harvest's location and size, harvest method used, and description of design and construction of roads and drainage systems, erosion control practices, restoration of the harvest area and other information required by these regulations. The THP shall be written, appropriate to the scale and intensity of the operations, and kept up to date. The long term objectives of management, and the means of achieving them, shall be clearly stated.

59. Under story: Vegetation below the forest canopy.

60. Unstable soils: Soils that are severely susceptible to erosion by wind, water or other eliminates of the environment that are susceptibie to landslides as shown on U.S. Natural Resources Conservation Service soil survey maps for Rio Arriba County.

61. Utilization: Removal of whole trees, tree stems or portions of trees from the cutting unit.

62. Water Bar: Drainage structure such as a ditch, mounded earth, or staked log, installed on a road or skid trail at an approximate thirty degree down slope angle which diverts surface water runoff into adjacent undisturbed areas.

63. Water Course: Stream of water or the bed of a stream.

64. Waiver: Specific exemption from a regulation granted in writing by the County. Requests for a waiver must be submitted in writing and signed by the applicant and the landowner.

65. Watershed: Area drained by a system of streams and springs.

66. Yarding (or landing): Place where logs are collected.

Article VI. Permit Application Requirements and Procedures

A. Pre-Application Conference

1. Landowners or their agents, (referred to as "applicants") shall meet with county planning staff prior to beginning work on a proposed timber harvest to determine whether a permit is required for a proposed harvest. At the conference, applicants shall generally describe the size and location of the proposed harvest with reference to acequias and other watercourses, public roads, communities or other landmarks; describe the geology and topography of the site of the proposed timber harvest with reference to United States Geological Survey 7.5 minute quadrangle or 1:24,000 scale maps and the U.S. Natural Resources Conservation Service soil survey maps for Rio Arriba County; and, disclose the name of the land owner or timber operator and the professional forester or qualified timber operator who will be

conducting the harvest and preparing the Timber Harvest Plan (THP).

2. Based upon the information received at the pre-application conference, the Planning and Zoning Department shall make an initial determination whether an applicant must apply for a Timber Harvest Permit. If so, planning staff shall provide the applicant with a copy of this ordinance and advise the applicant of all required submissions and notice requirements.

B. Timber Harvest Plan

1. Projects Requiring a Timber Harvest Plan

(a) A Timber Harvest Plan (THP) shall be prepared for all proposed timber harvests within Rio Arriba County unless the proposed harvest falls within one of the exceptions under Art. IV, Sec. A or under paragraph (2) below.

(b) Issuance of a Commercial Harvest Permit by the New Mexico Energy, Minerals and Natural Resources Forestry Division does not require Rio Arriba County to issue a Timber Harvest Permit where the proposed timber harvest would violate the terms, conditions, intent or requirements of this ordinance.

2. Exceptions from the THP Requirement

(a) Christmas tree harvests, firewood cutting or gathering for personal use and other wood products harvesting under 25 acres by any landowner or landowners on a parcel of land where there are no militating factors due to site-

specific conditions or harvesting methods; harvests of dead, dying, diseased trees below 10 % volume of timber per acre with no militating factors due to site-specific conditions or harvesting methods. One permit, 25 acres or less per year within the same area shall be approved administratively with application for review to the Planning Department to insure adequate water coarse protection.

(b) Active timber harvests in production as of the effective date of this ordinance are to treated as legal non-conforming uses. These harvest are not to be permitted to expand or enlarge operations beyond the area under harvest on the effective date of ordinance without a valid permit issued pursuant to these regulations.

3. Persons Qualified to Prepare a THP

A THP shall be prepared by a professional forester or qualified timber operator and shall comply with these regulations as set forth in Article VI of these regulations.

4. Contents of the THP

(a) Name, address, telephone number of property owner and timber owner (if different from the property owner) of the site of the proposed harvest; and name, address, telephone numbers and resume or work history of timber operator or professional forester.

(b) Legal description of proposed harvest site by section, township and range or other commonly used system: disclosure of acreage to be harvested and the extent of the harvest in terms of board feet to be removed or basal area per

acre to be left in the harvest area; an inventory of the forest types and timber resources on the harvest site; and, a narrative description of non-timber resources, including wildlife, water, soils, Under story vegetation, and known archeological, cultural and historic resources. Information, maps, diagrams, or photographs showing or describing the locations of archaeological resources shall remain confidential pursuant to NMSA 1978 §18-6-11.1.

(c) Management objectives, species selection, and type of forest products to be harvested. Management objectives shall clearly describe strategies and prescriptions for meeting the owner's objectives within the context of the forest's long-term sustainability.

(d) Description of applicant's choice of harvest system and equipment to be used.

(e) Descriptions and maps of logging roads to be used or developed; means of crossing or avoiding or watercourses or wetlands; construction design and placement of roads, water crossings and landings; and, any necessary and maps of public roads and routes to be used for hauling logs showing applicable seasonal weight rights of way or easements for crossing another's property. Applicants must also provide descriptions limits.

(f) Erosion Control Plan showing drainage facilities; soil stabilization methods; water crossings; and showing how roads, skid trails, and yarding areas will be designed and located to minimize surface and mass erosion, gullying, channel erosion and siltation of watercourses. Design and construction of roads and drainage systems shall be prepared

in compliance with Water Quality Protection Guidelines for Forestry Operations in New Mexico, New Mexico Energy, Mineral and Natural Resources Department (March 1983).

(g) A Regeneration plan for the site of proposed harvest, except for thinning operations, and the estimated cost of regeneration. The regeneration plan shall be prepared in compliance with Water Quality Protection Guidelines for Forestry Operations in New Mexico, New Mexico Energy, Mineral and Natural Resources Department (March 1983).

(h) Fire management plan addressing fire prevention and suppression plans.

(i) Map, USGS 7.5 minute quadrangle or 1:24,000 scale showing: Harvest area boundaries, boundaries or regeneration area, yarding area, public roads to be used for hauling, existing and proposed logging roads and water crossings, locations of all watercourses or acequias on property, location of unstable soils and steep slopes, steep slope and riparian buffer zones.

(j) Application for, or copy of, Commercial Harvest Permit submitted to or issued by the New Mexico Forestry Division.

C. Performance Standards

The Planning and Zoning Department shall consider the following performance standards in evaluating each application for a Timber Harvest Permit. All Timber Harvest Permit applications shall address means of achieving the performance standards.

1. Sustainability of Timber Production: The long-term sustainability of timber production in Rio Arriba County is declared to be beneficial to the public health, safety, welfare and economic well-being. Clear cutting without a valid sivicultural purpose is prohibited without a variance granted pursuant to this ordinance. Timber harvests using the seed tree method are strongly discouraged. Thinning of small diameter trees is strongly encouraged during or before saw timber harvest. (Thinning)

2. Economic Development anti local employment: Rio Arriba County hereby encourages sustainable timber harvesting, local employment and value added production of forest products on-site or in the neighboring communities to stimulate and maintain rural economic development.

3. Water Quality and Availability: All timber harvests permitted under this ordinance must include adequate buffer zones, terrain management and erosion control measures and well-designed roads, landings and water crossings to protect quality and availability.

The minimum standards for riparian buffer zones are as follows:

Slope of Land Above Watercourse	Buffer Strip Width, Each Side of Stream or Other Body of Water
0%	50 feet
10%	70 feet
20%	90 feet
30%	110 feet
40%	130 feet

New Mexico Standards for Interstate and Intrastate Streams shall be met or exceeded. Management activities, including harvesting and road building, should not cause a water body to fail to meet its designated use as defined in the state water quality standards. Forest operations near a water body that fails to meet state water quality standards for its designated use should not cause further deterioration of water quality and should take steps to improve water quality. Logs shall not be skidded across streams or water courses or through vernal pools or wetlands.

Timber harvests shall leave a residual stand of trees of not less than an average of 60 square foot Basil area per acre in trees 9 inches in diameter or greater at breast height.

4. Soil Protection: Timber harvests on slopes of 40 percent or more, or in unstable soils, are prohibited unless a variance is granted pursuant to this ordinance.

5. Logging Roads and Hauling: Logging roads, skid trails, water crossings and landing areas shall be designed and located so as to minimize soil disturbance and compaction, erosion and unnecessary vegetation and ground cover removal. Proposed locations of skid trails and logging roads shall be indicated in the permit application. Design of logging roads and drainage systems shall comply with Water Quality Protection Guidelines for Forestry Operations in New Mexico, New Mexico Energy, Mineral and Natural Resources Department (March 1983). Logging roads should be 15 feet wide. Landing areas should be one-quarter acre in size.

Logging trucks transporting forest products from the harvest site shall not violate any applicable or seasonal weight

limits for public roads.

6. Harvest Selection, Harvesting Techniques, Residual Stand Protection, Old Growth Management, Reforestation and Restocking, Management of Waste and Slash.

(a) Conamon harvest selection methods include:

(i) Seed-tree: a harvest technique which creates conditions similar to that of a clear-cut with the exception of the retention of a limited number of trees (singly or in clumps) within the harvested area to provide seed for a new generation of trees.

(ii) Shelterwood: a harvest technique involving a series of cuts with retention of trees within the harvest area for the purpose of: 1) providing seed for a new generation of trees; and 2) altering light conditions on the ground to create appropriate conditions for germination and establishment of seedlings. Shelterwood harvests typically lead to the creation of even-aged stands, although some variations may eventually result in uneven-aged stands.

(iii) Selection: harvest techniques designed to create uneven-aged stands and maintain high forest cover across the landscape. Individual Tree Selection and Group Selection are the two dominant methods utilized within selection systems, and are indicative of the size of canopy gaps created during harvest. The choice of method would be determined by the regeneration requirements of the species in question (i.e., shade, sunlight, moisture, temperature).

(iv) Salvage: harvest of trees that have been or are in imminent danger of being killed or damaged by injurious agencies (fire, insects, disease, etc.) other than competition between trees.

(v) Thinning: A timber cut done for purposes of enhancing the growth of the residual tree stand and for fire protection and not for regeneration of the forest. A thinning operation shall not result in the diminishment of existing or residual stands in terms of age class or size class. The primary focus of a thinning operation should be on the removal of the smaller, weaker trees of the stand. Thinning does not include selective harvesting of high-grade trees.

(vi) High grading: Which is the removal of only those trees with the highest economic value, without a valid silvicultural basis, is prohibited in order to preserve the long-term sustainability and viability of timber resources within Rio Arriba County.

(b) Timber harvest is to be conducted in such a way so as to avoid or minimize harm to the remaining trees on the property along skid trails and corridors.

(c) All old-growth stands should be identified and managed to preserve old-growth characteristics.

(d) Harvested areas shall be restored by restocking or reseeding. Where tree planting occurs, emphasis shall be on native, locally-sourced species, rather than exotics, or extra-regional genetic stock. The restocking requirement does not apply to thinning operations.

(e) Slash shall be used to the extent possible. Slash need not be burned at the harvest site, and may be used for firewood, lopped and scattered, or treated mechanically, so long as the slash treatment does not create or increase fire hazard or impair forest restoration methods.

(f) Chemicals, containers, liquid and solid non-organic wastes including fuel and oil shall be disposed of in an environmentally appropriate manner at off-site locations.

(g) Multiple Cutting Units: Unless specifically authorized by the Rio Arriba County Planning and Zoning, no commercial operator harvesting under a multiple unit permit shall commence harvest activities in a third unit unless all slash, water barring and utilization treatments have been completed on either of the previous two active units. Similarly, no commercial operator shall be allowed to fell timber in more than two cutting units at one time.

7. Archeological, historic and cultural resources: Applicants should make systematic efforts to identify areas of archeological, cultural, or historical significance, and to implement mechanisms to ensure that timber harvests do not damage such sites, and to incorporate protection of such sites into timber harvest plans and operations. The New Mexico Office of Cultural Affairs may be consulted for the purposes of surveying, recording, assessment and establishment of areas set aside for preservation.

8. Abatement of Noise, Dust, Smoke, and Traffic

(a) Timber harvests should be operated in such a manner so as to minimize dust and smoke emissions and

noise.

(b) Traffic generated by timber harvests shall not create a threat to the public health, safety or welfare or cause deterioration to county roads, culverts or bridges without compensation to the county for necessary improvements or repairs to county roads made necessary by the timber harvest or related activities, subject to the existing condition of the roads prior to the initiation of hauling timber from the harvest area.

9. Hours of Operation: Hours of operation may be regulated due to forest fire danger or to protect the public health, safety and welfare of county residents.

10. Compatibility with Adjacent Land Uses: The planning staff, planning committee and Board of County Commissioners shall consider the compatibility of the proposed timber harvest with adjacent land uses.

11. Combined Assessment of Individual Applications or Existing Harvests

(a) Planning and Zoning Department shall also review applications and existing harvests to determine whether, based upon the identity, relationship or affiliation of the applicants or permittee and the location of the proposed, permitted or exempt timber harvests, two or more pending or existing permits or exempt harvests should be considered to be a common plan or scheme of operation undertaken by an applicant, or permittee, or groups of applicants or permittees or operators of existing exempt harvests, to harvest timber.

(b) Purpose of a combined assessment is to determine whether such a common plan or scheme of operations exists, and if so, to identify, analyze and disclose the effects of the harvests on the environment, public and private property and infrastructure, and the public health, safety and welfare.

(c) The Planning and Zoning Department may order an applicant to prepare an Environmental Assessment pursuant to this ordinance upon a finding that the proposed and existing harvests, when assessed together, would have significant effects on the environment, public and private property, and infrastructure, and the public health, safety and welfare.

D. Fees and Performance Bond

1. Application Fees: The application and review fee shall be $100.00. The Planning and Zoning Department may set a graduated fee scale for review of THP applications depending on the size and complexity of the application or proposed harvest.

2. Plan Review Fee: Planning staff may have a THP reviewed by a qualified professional forester to be agreed upon by the Planning and Zoning Department and the applicant, the cost of which shall be paid by the applicant.

3. Performance Bond: Applicants shall post a bond equal to the cost of restoration of the timber land as set forth in the THP. The board of county commissioners, upon recommendation of the Planning and Zoning Department, may seek forfeiture of the bond in the event of failure to comply with restoration plan. The forfeited bond shall be used

only to cover forest restoration costs.

E. Effective Life of THP's anti Timber Harvest Permits

A THP and Timber Harvest Permit shall be effective for the duration of the harvest; or, for three years from the date of issuance if no timber is harvested pursuant to the plan.

F. Amendment of THP's

1. The Permittee must submit an Amended THP to the Planning and Zoning Department to reflect changes in land ownership of the site of the harvest; or discovery of previously unknown springs, watercourses, or archeological, cultural or historic resources; or expansions in the area of the permitted harvest area unless exempted by Article VI, Section (F) (4) below; or to reflect other significant changes in the information provided under Article VI, Section B (4).

2. The THP may be periodically revised to incorporate the results of monitoring or new scientific and technical information, as well as to respond to changing environmental, social and economic circumstances.

3. The Planning and Zoning Department may issue an Amended Timber Harvest Permit upon approval of an application for an amendment. Amendments involving significant changes in size, method or intensity of the harvest may require review by the Planning Department and Planning Committee and approval by the County Commission pursuant to Article VI, Section G through K. The determination of whether a proposed permit amendment will require further review shall be made at the discretion of the code

administrator.

4. A THP does not need to be revised if a single, proposed expansion is less than 10 percent of the permitted harvest or less than 25 acres, which ever is less. The Permittee must submit an Amended THP pursuant to this section for any further expansions.

(a) The Permittee shall give the Planning and Zoning Department written notification of the proposed expansion exempt from the requirement to prepare and submit an Amended THP.

(b) In cases where there are site specific militating factors present in the proposed harvest expansions area, the Permittee shall prepare an Amended THP for review and approval by the Planning and Zoning Department. Such proposals may also require preparation of an Environmental Assessment pursuant to Article VI, Section II where the Planning and Zoning Department finds that the proposed harvest expansion would have significant environmental or community impacts.

(c) The Permittee shall not begin harvesting or harvest related operations within the proposed expansion area until the Planning and Zoning Department issues a memorandum recording the proposed expansion that is exempt from the requirement to prepare and submit an Amended THP under this section.

G. THP Application Notice, and Public Participation Requirements

1. The Code Administrator shall hold a public meetings with the affected community to determine whether a THP shall be issued pursuant to this ordinance. The meeting will be informal in nature and the code administrator or designee has the discretion to limit the length and scope of testimony offered at the meeting.

2. Applicants shall send notice of the place, date and time of the public meeting on the THP application by certified mail return receipt requested to all property owners adjoining the exterior boundaries of the property to be harvested and to any potentially affected areas as determined by the Planning Department. Certificates of receipt shall be submitted to planning staff prior to the hearing on the application.

3. If the proposed harvest is located on or in the watershed of a stream, river, acequia or other body of water used for irrigation purposes, the Applicant shall also notify the mayordomos of all downstream acequias within the immediate area of the THP application and public meeting place, date and time for the application in person or by certified mail return receipt requested. Certificates of receipt shall be submitted to planning staff prior to the hearing on the application.

4. The applicant shall also post notices of the THP application and the place, date and time of the public meeting in a conspicuous place on the nearest public road to the proposed harvest, and also at the nearest post office serving the area in which the proposed harvest is located. Such

notices placed on public roads shall be at least 18 inches by 24 inches in size with a light background and dark lettering and shall also comply with applicable state or local laws, ordinances, or regulations regarding size, placement, text, or appearances. Statements of notification shall be submitted to Planning Staff prior to the public meeting of the application.

5. The public meeting on a THP application shall be held within fifteen (15) days of receipt of the application by the Planning and Zoning Department. The applicant shall comply with the notice requirements in paragraph 2, 3, and 4 above no later than ten (10) days before the date of the public hearing.

6. Persons, associations, organizations, corporations or others affected by a proposed timber harvest may also file written comments on the THP application with the Planning and Zoning Department.

7. The Planning and Zoning Department may coordinate and consult with any state, local or federal agency for technical assistance in the application process.

H. Staff Recommendation Upon Review of Application

1. Recommendation of approval: Upon review of a complete application and consideration of public comment, the Planning and Zoning Department may recommend issuances of a Timber Harvest Permit. The department shall have ten (10) working days after submission of a THP application to determine whether an application is complete. Incomplete applications shall be sent back to the applicant. The Planning and Zoning Department shall make a decision

on the application and issue a decision within five (5) working days of receipt of a complete application.

2. Finding of Significant Impact; Requirement to Prepare an Environmental Assessment: Upon review of a complete application and consideration of public comment, and finding that a proposed timber harvest will or may have a significant effect on watercourses or acequia systems, county or private property, other natural or historic resources, or the public health, safety and welfare, the Planning and Zoning Department may order an applicant to prepare an Environmental Assessment in compliance with Appendix I of this ordinance and Paragraph I below.

3. Denial: Upon review of the completed application and consideration of public comment, and finding that granting the permit application would significantly impair or jeopardize the public health, safety and welfare, the Planning and Zoning Department may deny a Timber Harvest Permit application.

I. Preparation of an Environmental Assessment

1. An applicant may be required to prepare an Environmental Assessment (EA) for a proposed harvest when the Planning and Zoning Department, upon review of the THP application, finds that the proposed harvest would cause a significant environmental impact. The department's findings shall be in writing and fully state the nature and significance of the environmental impact and the legal or factual basis for the finding.

2. An EA shall be appropriate to the scale, intensity of the timber harvest, and the uniqueness of the affected resources. EAs shall include watershed-level considerations as well as the impacts of on-site harvest and processing facilities. Environmental impacts shall be assessed prior to commencement of site-disturbing operations. The EA shall be a supplement to and incorporate the THP.

J. Staff Decision Upon Review of an Application and EA

1. Recommendation of Approval: Upon review of the complete application and EA and completion of hearings and the period for public comment, the Planning and Zoning Department may issue a Timber Harvest Permit. The Planning and Zoning Department shall make a decision on the application and Environmental Assessment and issue a decision within five (5) working days of their receipt by the department.

2. Denial: Upon review of the completed application and EA and consideration of public comment, and finding that granting the permit application would significantly impair or jeopardize the public health, safety and welfare, the Planning and Zoning Department may deny a Timber Harvest Permit application.

K. Planning Staff, Applications Planning Committee and County Commission Action on THP Applications

1. The Planning Staff shall have ten (10) working days in which to review the application for completeness. If the application is deemed complete it shall proceed for processing before the respective county governmental bodies. If it is

deemed incomplete, the Planning Staff will notify the applicant in writing of the deficiencies. The application will not again be reviewed until a complete application is submitted.

2. The Planning and Zoning Committee shall review and recommend approval or denial of all THP applications after the Planning and Zoning Department has made its recommendation on the application.

3. The applicant shall provide fifteen (15) days notice of the Planning and Zoning Committee's consideration of the THP application as follows:

(a) Applicants shall send notice of the THP application and its place and date of consideration by the Planning Committee by certified mail return receipt requested to all property owners adjoining the exterior boundaries of the property to be harvested and to any potentially affected areas as determined by the Planning Department. Certificates of receipt shall be submitted to planning staff prior to the Planning Committee's consideration of the application.

(b) If the proposed harvest is located on or in the watershed of a stream, river, acequia or other body of water used for irrigation purposes, the Applicant shall also notify the mayordomos of all downstream acequias of the THP application and its place and date of consideration by the Planning and Zoning Committee. Notice shall be in person or by certified mail return receipt requested. Statements of notification or certificates of receipt shall be submitted to planning staff prior to the Planning Committee's consideration of the application.

(c) The applicant shall also post fifteen (15) days notice of the THP application and its place and date of consideration by the Planning and Zoning Committee in a conspicuous place on the nearest public road to the proposed harvest, and also at the nearest post office serving the area in which the proposed harvest is located. Such notices placed on public roads shall be at least 18 inches by 24 inches in size with a light background and dark lettering and shall also comply with applicable state or local laws, ordinances, or regulations regarding size, placement, text, or appearances. Statements of notification shall be submitted to planning staff prior to the Planning Committee's consideration of the application.

(d) A notice stating the Planning Committee will consider a THP application shall be published in a newspaper of general circulation serving Rio Arriba County at least once no later than 15 days prior to the date of the meeting at which the Planning Committee will hear the application. The published notice shall state the applicant's name, location of proposed timber harvest and the place and date of the Planning commission's consideration of the application. A copy of the notice shall be submitted to planning staff prior to the hearing on the application.

4. The Rio Arriba Board of County Commissioners shall make the final decision on whether to approve or approve with conditions or deny a THP.

5. The applicant shall provide notice of the County Commission's consideration of the THP application as follows:

(a) Applicants shall send notice of the THP application and its place, date and time of consideration by the County Commission fifteen (15) days prior to the meeting deadline by certified mail return receipt requested to all property owners adjoining the exterior boundaries of the property to be harvested and to any potentially affected areas as determined by the Planning Department. Certificates of receipt shall be submitted to planning staff prior to the County Commission's consideration of the application.

(b) If the proposed harvest is located on or in the watershed of a stream, river, acequia or other body of water used for irrigation purposes, the Applicant shall also notify the mayordomos of all downstream acequias of the THP application and its place and date of consideration by the County Commission. Notice shall be in person or by certified mail return receipt requested. Statements of notification or certificates of receipt shall be submitted to planning staff prior to the County Commission's consideration of the application.

(c) The applicant shall also post notices of the THP application and its place and date of consideration by the County Commission in a conspicuous place on the nearest public road to the proposed harvest, and also at the nearest post office serving the area in which the harvest is 18 inches by 24 inches in size with a light background and dark letting and shall also comply with applicable state or local laws, ordinances, or regulations regarding size, placement, text, or appearances. Statements of notification shall be submitted to planning staff prior to the County Commission's consideration of the application.

(d) A notice stating the County Commission will consider a THP application shall be published in a newspaper of general circulation serving Rio Arriba County at least once no later than 15 days prior to the date of the meeting at which the County Commission will hear the application. The published notice shall state the applicant's name, location of proposed timber harvest and the place and date of the County Commission's consideration of the application. A copy of the notice shall be submitted to planning staff prior to the County Commission's consideration of the application.

L. Administrative Appeals and Judicial Review

1. Appeal of a Planning and Zoning Department Decision: Planning and Zoning Department decisions with respect to the granting or denial of a Timber Harvest Permit, or decisions with respect to whether an EA should be required of an applicant may be appealed to the planning committee within fifteen (15) days of the date of the decision pursuant to NMSA 1978 §3-21-8 and the Rio Arriba County Design and Development Regulation System, Article II, Sec. VI, G.

2. Appeal of a Planning anti Zoning Committee Decision: Planning and Zoning Committee decisions upholding, reversing or remanding Planning and Zoning Department decisions regarding the issuance or denial of Timber Harvest Permits or decisions with respect to whether an EA should be required of an applicant may be appealed to the board of county commissioners within fifteen (15) days of the date of the decision pursuant to NMSA 1978 §3-21-8 and the Rio Arriba County Design and Development Regulation System, Article II, Sec. VI, G.

3. Judicial Review of a Decision by the Board of County Commissioners: Decisions of the board of county commissioners upholding, reversing or remanding Planning and Zoning Committee decisions to the Planning and Zoning Department regarding the issuance or denial of Timber Harvest Permits or decisions with respect to whether an EA should be required of an applicant may be appealed to the First Judicial District Court pursuant to NMSA 1978 §3-21-9.

4. Initiating Appeals to the Planning and Zoning Committee or Board of County Commissioners: Persons aggrieved by a decision of the Planning and Zoning Department or the Planning and Zoning Committee may initiate the appeals process upon filing a written Notice of Appeal with the Planning and Zoning Department and payment of an appeal fee of $50.00.

5. Hearing Dates: A hearing on the appeal shall be held by the appropriate body at its next regularly scheduled meeting or within 45 days of the appeal date, provided that the public notice requirements for a public hearing can be met by the appealing party.

6. Quasi-Judicial Nature of Appeal Hearings: Appeals to either the Planning and Zoning Committee or board of county commissioners shall be quasi-judicial in nature and shall follow the procedures set forth in the Rio Arriba County Design and Development Regulation System, Article II. Sec. II, B.

Article VII. Variances

A. A written application for a variance from the terms, limitations, and requirements of this ordinance shall be submitted to the Planning and Zoning Department by the Applicant as part of the THP application packet or later as a separate submission. The application for a variance shall be accompanied by a non-refundable filing fee of $75.00 per variance from the terms of this ordinance sought by the Applicant.

B. The variance application shall identity the term, limitation or requirement with reference to the article, section and paragraph for which the applicant seeks a variance. The variance application shall also state the grounds upon which the variance is sought. Lack of technical ability or the expense in preparing the THP application shall not be grounds for seeking or granting a variance.

C. There shall be no administrative variances granted by the Planning and Zoning Department under the Timber Harvest Ordinance. The Planning and Zoning Department shall review variance applications and make recommendation for consideration by the Planning and Zoning Committee.

D. Before recommending approval of a variance to the Planning and Zoning Committee, the Planning and Zoning Department shall make the following findings of fact. These same findings must be made by the Planning and Zoning Committee before it may recommend approval to the Board of County Commission. Finally, these same findings must be made by the Board of County Commission before it may approve a variance:

1. Granting of the variance shall not constitute a grant of special privilege inconsistent with the limitations on other properties in the area of notice.

2. Granting of the variance shall not be detrimental to the public health, safety, or welfare, or the materially injurious to properties or improvements in the area of notice.

3. Granting the variance is justified because there is a physical hardship for the applicant resulting from size, shape or existing structures thereon, or from topographic or physical conditions on the site or in the area of notice.

4. Granting the variance upholds the spirit and intent of the Rio Arriba County Design and Development Regulation System and this ordinance, and that in doing so the public safety and welfare is secured, and substantial justice is done.

5. The variance shall be warranted for one or more of the following reasons:

(a) Strict or literal interpretation and enforcement of the specified performance standard or regulation would result in unnecessary physical hardship inconsistent with the purposes of this ordinance.

(b) Exceptional or extraordinary circumstances or conditions applicable to the site of the variance that do not apply generally to other properties in the vicinity.

(c) Strict or literal interpretation and enforcement of the specified performance standard or regulation would deprive the applicant of privileges enjoyed by the owners of

other properties in the area of notice.

E. The Planning and Zoning Department shall submit the variance application, the THP application, proof of compliance with the notice and filing fee requirements, and the Department's findings of fact and recommendation to the Planning and Zoning Committee for a hearing within 45 days of receiving the completed variance application.

F. Upon setting a hearing date before either the Planning and Zoning Committee or the board of county commissioners, the applicant shall give notice of the hearing pursuant to Art VI, Sec. G of this ordinance.

G. Upon review of the applications and completion of hearings and the period for public comment, the Planning and Zoning Committee shall make recommendations for all variance requests to the Board of County Commissioners. Recommendations for approval of variances must be approved by a majority vote of the members of the Planning and Zoning Committee.

H. The Board of County Commissioners shall decide all variance requests within 60 days following issuance of the Planning and Zoning Committee recommendation and of the Applicant meeting the notice requirements pursuant to Article VI, Section K (5). Decisions on request for variances shall be approved by a majority vote of the board of county commissioners.

I. In granting variances, the Board of County Commission may impose conditions regarding the timber harvest and related operations to ensure that the timber

harvest and related operations to which the variance applies will be as compatible as practicable with, and not adversely effect, properties within the area of notification for the requested variance, downstream communities, or the communities through which the harvested timber is transported

Article VIII. Violations anti Enforcement

A. Monitoring: Monitoring shall be conducted by the Rio Arriba Staff and the New Mexico Forestry Division during permitted timber harvests to assess the condition of the forest and watershed, compliance with the THP and for community and environmental impacts. The frequency and intensity of monitoring should be determined by the scale and intensity of the timber harvest as well as the relative complexity and fragility of the affected environment Monitoring procedures should be consistent and replicable over time to allow comparison of results and assessment of change per State and County Staff.

B. Administrative Procedures: Administrative enforcement of this ordinance shall follow the procedure set forth in the Rio Arriba County Design and Development Regulation System, Article II, Sec. VII, A.

C. Civil Actions: This ordinance may be enforced in the district court by the board of county commissioners, the district attorney or attorney general pursuant to NMSA 1978 §3-2I-1, et seq, or by the board of county commissioners, or adjacent and neighboring property owners pursuant to the Rio Arriba County Design and Development Regulation System. Article I, Sec. X. Relief may include abatement, injunction,

mandamus and civil penalties. Affected person, applicants and permittees may sue the board of county commissioners to compel performance of any non-discretionary duty by county staff. In an action brought pursuant to this ordinance, either the board of county commissioners or a person who has an interest that is or may be adversely affected may intervene if not a party.

D. Civil Penalties: Upon conviction in a civil action for violation of this ordinance, the defendant shall pay civil penalties in accordance with the Rio Arriba County, Design and Development Regulation System, Article I, Sec. X. for each violation of this ordinance.

Article IX. Amendments to the Timber Harvest Ordinance

Amendments to this ordinance shall follow the procedure set forth in the Rio Arriba County Design and Development Regulation System, Article II, Sec. IX.

Article X. Effective Date of the Ordinance

This ordinance shall take effect thirty (30) days after final passage by the board of county commissioners.

Appendix I - Contents of an Environmental Assessment

A. Introduction.

1. An applicant shall prepare and submit an Environmental Assessment with a Timber Harvest Permit application when the Planning and Zoning Department has determined that the proposed timber harvest would have a

significant impact on watercourses or acequia systems, public or private property, natural or historic resources, or the public health, safety and welfare.

2. An Environmental Assessment (EA) shall identify the impacts of the proposed timber harvest on the environment, property, infrastructure and public health, safety and welfare as set forth in Section B below and provide sufficient analysis of these impacts to enable the public and Planning and Zoning Department to make an informed decision on whether to recommend issuance of a Timber Harvest Permit application.

3. The Environmental Assessment shall include watershed-level considerations as well as the impacts of on-site harvest and processing facilities. Environmental impacts shall be assessed prior to commencement of site-disturbing operations.

B. Contents of the Environmental Analysis

1. Management Objectives - The EA shall briefly describe the applicant's management objectives for the proposed timber harvest and the location, area and the extent of the proposed timber harvest.

2. Identification of Significant Impacts- The EA shall include the Planning and Zoning Department's findings made upon review of the Timber Harvest Permit application that the proposed timber harvest would have significant impacts on watercourses or acequia systems, county or private property, natural or historic resources, or the public health, safety and welfare.

3. Timber Harvest Impacts Analysis

(a) The EA shall address the environmental impacts of the proposed timber harvest on timber and vegetation; soils and geology; water courses and wetlands; water quality, quantity and availability; wildlife and fish habitat; and archeological, cultural and historic resources. The analysis shall also include the cumulative impacts of all other forest uses and development in the watershed in which the proposed harvest is located.

(b) The EA shall identify and disclose the potential effects on the county and its citizens and property owners in terms of impacts to public and private infrastructure and property; compatibility with adjacent land uses; impact of the proposed harvest on the local economy and workforce; and on the public health, safety and welfare.

(c) The EA shall state whether the impacts of the proposed timber harvest can be eliminated or mitigated through project design or planning. The EA may also identify and analyze other impacts not identified by the Planning and Zoning Department.

(d) The Planning Department may require the applicant to seek the comments and input of New Mexico state agencies with specialized expertise such as the State Engineer, the Environment Department, the Office of Cultural Affairs, the Forestry Department, the Highway and Transportation Department and the Soil and Water Conservation Districts so that the effects on water quality, water rights, archeological, historic and cultural resources, forestry, environmental issues, road and highway safety, road

and highway suitability, public safety of the proposed timber harvest may be more fully understood. Written comments or opinions of the consulting agencies shall be attached in full to the EA.

4. Preparation:

An EA shall be prepared by an independent third party with appropriate technical or scientific skills or expertise as approved by the Planning and Zoning Department and paid for by the applicant.

Appendix II. Consideration by Federal Agencies

Federal law specifically requires that government agencies consider this ordinance as well as the entire Rio Arriba County Design and Development Regulation System (Ordinance No. 1996-01) in the preparation of environmental analysis pursuant to the National Environmental Policy Act 42 U.S.C. 4321 et.seq, and its implementing regulations at 40 C.F.R. Part 1500. specifically 40 C.F.R. Section 1502.16 (c) and 1506.2 (d).

Rio Arriba
Board of County Commissioners
Espanola Branch Office

RIO ARRIBA COUNTY ORDINANCE 1998-05
THIS ORDINANCE WILL BE KNOWN AS
RIO ARRIBA TIMBER HARVEST ORDINANCE

WHEREAS, the County of Rio Arriba will provide a guide for reviewing, approving or denying, the permitting of harvesting forest timber, while trying to protect forest, bosques, water sheds, landowners, and the health, safety, and welfare of the people of Rio Arriba and,

WHEREAS, this ordinance will be one of several that will be a section or part of the comprehensive plan by the powers granted to Counties to protect and promote prosperity and,

WHEREAS, the County of Rio Arriba has a substantial amount of forest land and a process anti system of guiding such activities is needed,

Therefore, the Board of County Commissioners of Rio Arriba County will review, approve and adopt this ordinance to take effect thirty (30) days subsequent to the approval and signature of this ordinance, dated this day 27th of August, 1998.

/s/ _____
Alfredo L. Montoya, Chairman

/s/ _____
Moises Morales, Commissioner

/s/ _____
Ray Tafoya, Commissioner

ATTEST:

/s/ _____
Fred Vigil, County Clerk

Certificate of Filing

I, Fred Vigil, County Clerk, do hereby certify that the foregoing ordinance designated as Ordinance 1998-05 was filed in my office on the 28th day of August 1998 in Book Number 1 Pages 1228-1251

CERTIFICATE

STATE OF NEW MEXICO)
)
COUNTY OF RIO ARRIBA)

I, J. Fred Vigil, County Clerk and Recorder in and for the aforesaid county and state hereby certify that the foregoing is a true and correct copy of R.A. County Ordinance # 1993-05 as the same appears or record in my office, book 1 page 1228-1251

In witness whereof, I have hereunto set my hand and affixed my official seal on this 30th day of March, 1999

/s/ _____
J. Fred Vigil
Rio Arriba County Clerk

By: /s/ _____
Deputy

APPENDIX G

UNITED STATES CODE ANNOTATED
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
TITLE VII. GENERAL PROVISIONS

Amendments received to 9-9-02

Cir. R. 27.1. Certification of questions of state law

(A) Certification; abatement. When state law permits, this court may:

(1) certify a question arising under state law to that state's highest court according to that court's rules; and

(2) stay the case in this court to await the state court's decision of the certified question.

(B) Motion. The court may certify on its own or on a party's motion.

(C) Time to file. A motion to certify should be filed at the same time as, but separately from, the moving party's brief on the merits.

(D) Response; time to file. A response may be filed at the same time as the answer or reply brief or within 10 days after the motion is served.

(E) When considered. A motion to certify is ordinarily referred to the panel of judges assigned to decide the appeal on the merits and is considered at the same time as the arguments on the merits.

MICHIE'S NEW MEXICO STATUTES ANNOTATED
RULES OF APPELLATE PROCEDURE
ARTICLE 6
SPECIAL PROCEEDINGS

Current through June 5, 2002

12-607 Certification from other courts

A. Power to answer. The Supreme Court may answer by formal written opinion questions of law certified to it by a court of the United States, an appellate court of another state, a tribe, Canada, a Canadian province or territory, Mexico or a Mexican state if the answer may be determinative of an issue in pending litigation in the certifying court and the question is one for which answer is not provided by a controlling:

(1) appellate opinion of the New Mexico Supreme Court or the New Mexico Court of Appeals; or

(2) constitutional provision or statute of this state.

B. Method of invoking. The court certifying a question of law shall issue a certification order and forward it to the Supreme Court.

C. Contents of certification request. A certification order must contain:

(1) the names and addresses of counsel of record and parties appearing without counsel;

(2) the question of law to be answered;

(3) the facts relevant to the question, showing fully the nature of the controversy out of which the question arose. If the parties cannot agree on a statement of facts, the certifying court shall determine the relevant facts and state them as part of its certification order; and

(4) a statement acknowledging that the Supreme Court may reformulate the question.

D. Response. The Supreme Court shall notify the certifying court of acceptance or rejection of the question and, in accordance with notions of comity and fairness, respond to an accepted certified question as soon as practicable.

E. Briefs. Unless otherwise ordered by the Supreme Court, the court, in its acceptance of certification, shall designate which party shall file the first brief in the court on the question certified. Unless otherwise ordered, the first brief shall be filed with the court within thirty (30) days of mailing of notification by the court that it will answer the question certified. The opposing party shall file its answer brief or briefs within thirty (30) days of service of the first brief. A reply brief may be filed within fifteen (15) days of service of the answer brief. The time for filing briefs may be extended as provided for in Paragraph C of Rule 12-309 of these rules. Briefs and service thereof shall be in the manner and form provided in Rules 12-213, 12-302, 12-305, 12-307 and 12-308.

F. Oral argument. Oral argument shall be as provided in Rule 12-214 for appeals.

G. Record. The Supreme Court, on its own motion or upon motion of any party, may request that copies of all or any portion of the record before the certifying court be filed

with the Court.

H. Opinion. The Supreme Court shall forward to the certifying court and all parties a copy of its formal written opinion answering the question certified.

[As amended, effective December 1, 1993; January 1, 1997; December 4, 1998.]

NEW MEXICO STATUTES 1978 ANNOTATED
CHAPTER 9. EXECUTIVE DEPARTMENT
ARTICLE 5A. ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

Current through the 2002 Second Regular Session of the 45th Legislature.
Notes of decisions are current through 2002-NMSC-006 2002-NMCA-036.

§ 9-5A-4. Divisions; duties

In addition to the duties assigned to each division of the energy, minerals and natural resources department by the secretary of energy, minerals and natural resources:

A. the administrative services division shall provide clerical, recordkeeping and administrative support to the department in the areas of personnel, budget, procurement and contracting;

B. the energy conservation and management division shall plan, administer, review, provide technical assistance, maintain records and monitor state and federal energy conservation and alternative energy technology programs;

C. the forestry division shall enforce and administer all laws and regulations relating to forestry on lands within the state;

D. the mining and minerals division shall enforce and administer laws and regulations relating to mine safety, coal surface mine reclamation and abandoned mine lands reclamation;

E. the oil conservation division shall administer the laws and regulations relating to oil, gas and geothermal resources, except those laws specifically administered by another authority; and

F. the state park and recreation division [state parks division] shall develop, maintain, manage and supervise all state parks and state-owned or state-leased recreation areas.

History: Laws 1987, ch. 234, § 4; 1997, ch. 137, § 2.

NEW MEXICO STATUTES 1978, ANNOTATED
CHAPTER 68. TIMBER
ARTICLE 2. FOREST CONSERVATION

Current through the 2002 Second Regular Session of the 45th Legislature.
Notes of decisions are current through 2002-NMC-006 and 2002-NMCA-036.

§ 68-2-8. Statewide responsibility for forest fire protection

The state shall have the responsibility for prevention and suppression of forest fires on all nonfederal, nonmunicipal lands in the state. Activities authorized under this section shall include, but not be limited to, cooperation with federal, state and local agencies in the development of systems and methods for the prevention, control, suppression and prescribed use of fires on rural lands and within rural communities; and providing financial, technical and related assistance to others to organize, train and equip local fire-fighting forces to prevent, control and suppress fires threatening the natural resources of rural forest areas. For such purposes:

A. the police power of the state shall extend to such control of private forest lands as shall be necessary for the prevention and suppression of forest fires;

B. the state forester and his agents shall have unrestricted access to private and state lands, including the use of roads and trails, in order to carry out forest fire prevention and suppression work;

C. the state forester and his agents shall not be liable to civil action for trespass or for damages for acts done in the course of their official duties unless otherwise expressly provided by contract or agreement with the landowner, which contract or agreement is made pursuant to the provisions of the Forest Conservation Act [68-2-1 to 68-2-25 NMSA 1978]; and

D. the state forester and his agents may, in the event of a forest fire, summon and deputize any able-bodied man to assist in suppressing the forest fire and may request tools and equipment under the control of or owned by the landowner or timber operator upon whose lands the forest fire is burning or whose lands are threatened by the forest fire.

History: 1953 Comp., § 62-3-6.2, enacted by Laws 1967, ch. 208, § 2; 1979, ch. 395, § 3.

NEW MEXICO STATUTES 1978, ANNOTATED
CHAPTER 68. TIMBER
ARTICLE 2. FOREST CONSERVATION

Current through the 2002 Second Regular Session of the 45th Legislature.
Notes of decisions are current through 2002-NMSC-036.

§ 68-2-14. Enforcement of laws; investigation of violations

The division is authorized to enforce all laws, rules and regulations relating to all forested, cutover or brushlands lying within the state under the following circumstances:

A. prevention and suppression of fires;

B. logging and timber operations and practices;

C. trespass, waste and littering; and

D. conservation of commercial forest lands and products.

In addition, the state forester and all persons designated by him are authorized to go upon such lands to make investigations concerning violations of the laws, rules and regulations and are given the necessary police powers to apprehend and arrest on warrant issued by any magistrate of the state for violation of the laws, rules and regulations, or without warrant for violations thereof committed in their presence, and shall not be liable to civil actions in trespass for acts done in discharge of their duties.

History: 1953 Comp., § 62-3-9, enacted by Laws 1959, ch. 122, § 9; 1977, ch. 254, § 83; 1979, ch. 395, § 4.

NEW MEXICO STATUTES, 1978 ANNOTATED
CHAPTER 68. TIMBER
ARTICLE 2. FOREST CONSERVATION

Current through the 2002 Second Regular Session of the 45th Legislature.
Notes of decisions are current through 2002-NMSC-006 and 2002-NMCA-036.

§ 68-2-16. Rules and regulations of division

The division is authorized to make and enforce rules and regulations not in conflict with any law now in force as it deems necessary for the prevention and suppression of forest or brush fires, and for the control of forest pests and for the application of commercial forest practices within the state. The rule-making power includes but is not limited to the requiring of registration of sawmills, declaring of designated areas to be high-hazard fire areas and closing them to entry by the general public for reasonable periods and requiring commercial forest vegetative types to be harvested in such manner as to support forest practices that maintain and enhance the economic benefits of forests and forest resources to New Mexico. Rules and regulations shall be provided to all interested parties upon request. Nothing in the Forest Conservation Act [68-2-1 to 68-2-25 NMSA 1978] shall prevent a landowner hereafter from converting forest vegetative types to nonforest vegetative types for such purposes as range, wildlife habitat, farming, surface mining or subdivision development; provided, however, any slash resulting from such conversion shall be treated in a manner that will minimize the spread of forest fires and the possibility of insect epidemic.

History: 1953 Comp., § 62-3-11, enacted by Laws 1959, ch. 122, § 11; 1961, ch. 113, § 1; 1977, ch. 254, § 85; 1979, ch. 395, § 5.

APPENDIX H

NEW MEXICO ENERGY, MINERALS & NATURAL RESOURCES DEPARTMENT
Jennifer A. Salisbury
Cabinet Secretary

COMMERCIAL HARVEST PERMIT

[February 23, 2000]

Permit No. 00-1-3

February 11, 2000

Mr. Pat Beard
Rancho Lobo, LTD.
609-B East Clinton Avenue
Athens, Texas 75751

Dear Mr. Beard:

Your Harvest Permit Application submitted on February 10, 2000, for the South Road Timber Sale has been reviewed and approved. The sale may begin on or following February 15, 2000. Notification as to when harvest activities will begin must be given to the Chama District Office at least 48 hours before the actual harvesting commences, as required by New Mexico Regulations 19 NMAC 20.2. The expiration date for this permit will be September 1, 2000.

Harvesting must follow the prescription outlined in the Regeneration Plan that was submitted with the application. Periodic inspections of the sale area will be made to verify compliance with the harvest prescription and New Mexico Regulations 19 NMAC 20.2. Completed inspection forms detailing the sale's progress, along with any areas requiring attention, will be sent to all parties involved.

Any variance from the harvest prescription or regulations is a violation of State law and will result in cessation of harvest activities and/or issuance of citations. Also, the Rio Arriba County Planning and Zoning Department have passed a county-wide timber harvest ordinance. This county ordinance, along with other local, State, and/or Federal laws or regulations are not covered under this permit. It is your responsibility to make sure all applicable permits are secured before harvest activities begin.

If you have any questions feel free to give Brad Bail or myself a call at 505-588-7831.

Sincerely,

/s/ _____
Kenneth G. Schein
Chama District Forester

xc: Gary Harris
Richard Doyan
Rio Arriba County Planning and Zoning Department

APPENDIX I

RIO ARRIBA PLANNING

[March 10, 2000]

Patricio Carcia
Director

Gilbert Chavez
Assistant Planning Director

March 6, 2000

Mr. Paul Beard
609-B East Clinton Ave.
Athens, TX 75751

Dear Mr. Beard,

I have been notified by the New Mexico State Forestry Department that you have applied for and been granted a permit to harvest timber on the Lobo Ranch near Chama, New Mexico.

The purpose of this letter is to inform you that a timber harvest permit must be applied for and granted pursuant to the Rio Arriba County Timber Harvest Ordinance. The process for being granted a timber harvest permit from the County is quite different and more involved than that required by the new Mexico Forestry Department.

If you need a copy of the ordinance, please let me know and I will mail one to you as soon as possible. I know that it is probably not possible to initiate harvesting activity at this time due to ground conditions, however because the application process with the County could take as long as 75 days it is important that a permit be applied for as early as possible. I would also be happy to send an application to you if you so desire. It is our intention to move the process along as expedinously as possible because we understand that harvesting needs to commerce when the ground conditions are optimum.

Thank you very much for your attention to this matter, if you need any assistance please do not hesitate to call me at 505-753-7774.

Sincerely,

/s/ _____
Antonio DeVargas, Assistant Planner

Supreme Court, U.S.
FILED
FEB 5 2003

(2)

No. 02-850

In the

Supreme Court of the United States

RANCHO LOBO, LTD.,

Petitioner,

v.

ANTONIO DEVARGAS, PATRICIO ANTONIO GARCIA, GILBERT CHAVEZ, MOISES MORALES, ALFREDO MONTOYA, NELSON CORDOVA, in their Individual and Official capacities, and THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF RIO ARRIBA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Simeon Herskovits
Counsel of Record
Western Environmental
Law Center
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18 pp

QUESTION PRESENTED

Whether the Court of Appeals correctly applied New Mexico state law of preemption in holding that a county timber harvest ordinance, which was otherwise within the proper scope of county zoning under New Mexico state law, was not preempted by less restrictive state law concerning forestry.

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STATUTORY PROVISIONS OMITTED FROM PETITION

The Petition fails to mention the New Mexico statutes providing for county zoning power. N.M. Stat. Ann. §§ 3-21-1 to 3-21-14, 4-37-1 (1978).

MISSTATEMENTS OF FACT AND LAW IN PETITION

Petitioner's statement of the case contains misleading and argumentative statements and characterizations of fact. The first is Petitioner's characterization of the Tenth Circuit as having "intervened on behalf of a local New Mexico county timber harvesting ordinance." Petition at 3. In fact, Petitioner chose to pursue its state law claims through the federal courts, and the Tenth Circuit's routine application of New Mexico state law on appeal cannot accurately be characterized as a form of "intervention." Indeed, the Tenth Circuit's decision below contains nothing more than the straightforward resolution of pure questions of law.

Petitioner also mischaracterizes the New Mexico Forest Conservation Act as "specifically insur[ing] the preservation of clear cutting." *Id.* Such an aggressive construction of that statute is belied by the language of the statute itself, which merely provides that the statute itself does not "prevent" a landowner from clear cutting. See N.M. Stat. Ann. § 68-2-16 (1978). The Act does not guarantee or affirmatively provide a right to clear cut. This is precisely what the Tenth Circuit properly held. 303 F.3d 1195, 1205 (10th Cir. 2002); Petition, Appendix B at 20a-21a.

Respondents also dispute Petitioner's assertion that, at oral argument, the Tenth Circuit panel expressed concern over the State Forestry Division's authority. Petition at 5. In fact, the panel expressed a clear understanding that the preemption question before them was a pure question of law and that Petitioner's numerous questionable assertions about the Forestry Division's concerns were irrelevant to the resolution of that legal issue.

Respondents also urge the Court not to accept Petitioner's self-serving characterizations of the Tenth Circuit's holding and reasoning. The decision below speaks for itself.

REASONS FOR DENYING THE WRIT

The appeal in this diversity case dealt with two straightforward issues of New Mexico state law: (1) whether Rio Arriba County's Timber Harvest Ordinance is preempted by the New Mexico state law concerning forestry; and (2) whether the Timber Harvest Ordinance violates New Mexico law by vesting the County's planning department with unguided discretion. The District Court had answered both questions in the affirmative.

After reviewing and applying the New Mexico statutory and decisional law pertinent to these two issues, the Tenth Circuit reversed the District Court on both points. *Rancho Lobo, Ltd. v. DeVargas*, 303 F.3d 1195 (10th Cir. 2002). Petitioner seeks review from this Court only as to the Tenth's Circuit ruling on preemption. For the reasons set forth below, the Court should deny Petitioner's request.

I. The Writ Should Be Denied Because Petitioner Has Failed to Establish Any Compelling Reason under Supreme Court Rule 10

First, Petitioner has failed to articulate any compelling reason why this Court should issue a writ of certiorari in this case, as required by Supreme Court Rule 10. Pursuant to that rule "[a] petition for a writ of certiorari will be granted only for compelling reasons" and "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10. The types of issues that merit review on a writ of certiorari generally consist of: conflicts between federal courts of appeals; decisions by a federal court that so far depart from the accepted and usual course of judicial proceedings that the Supreme Court feels it must exercise its supervisory power; decisions of important federal questions by a federal court of appeals or a state court of last resort that conflict with decisions of another federal court of appeals, a state court of last resort, or the Supreme Court; or a state court or federal court of appeals decision of an important question of federal law that should be settled by the Supreme Court. *See* S. Ct. R. 10(a)-(c).

The Tenth Circuit's decision below did not create any conflict between itself and any other federal courts of appeal or state court of last resort, and Petitioner does not contend that it did. Because it dealt only with New Mexico state law questions under diversity jurisdiction, the Tenth Circuit's decision below also did not raise or address any important question of federal law that should be settled by this Court.

For the most part, Petitioner's argument for granting a writ of certiorari amounts to nothing more than a claim that the Tenth Circuit applied state law incorrectly. As explained below, Petitioner's argument that the Tenth Circuit misapplied New Mexico law of preemption is wrong. But even were Petitioner correct about the state law question, and the Tenth Circuit wrong, that would not be the sort of error that warrants review by this Court on a writ of certiorari. S. Ct. Rule 10.

The closest Petitioner comes to articulating the type of compelling reason required for a writ of certiorari is Petitioner's contention that the Tenth Circuit violated proper judicial procedure by applying state law instead of certifying the preemption issue to the New Mexico Supreme Court. As explained below, however, that argument is without merit.

II. The Writ Should Be Denied Because this Is a Routine Diversity Jurisdiction Case in Which the Tenth Circuit Properly Applied the New Mexico State Law of Preemption

The law of New Mexico as articulated in decisions of the New Mexico State Supreme Court and Court of Appeals is clear and well-established enough to allow the Tenth Circuit to resolve the state law questions raised on appeal in this case. As explained in the Court of Appeals' decision and Respondents' briefs below, the New Mexico Supreme Court has enunciated coherent general rules and principles regarding the broad authority of counties and municipalities to regulate various aspects of land use and the limited circumstances in which local ordinances should be found to be preempted by, or in conflict with, state laws.

See Chapman v. Luna, 678 P.2d 687 (N.M. 1984); *Casuse v. City of Gallup*, 746 P.2d 1103 (N.M. 1987); *Board of Comm'rs of Rio Arriba County v. Graecen*, 3 P.3d 672 (N.M. 2000). These general principles have been interpreted and applied in a consistent manner by the New Mexico Court of Appeals in an unbroken line of decisions extending over more than thirty years. *See City of Hobbs v. Biswell*, 473 P.2d 917 (N.M. Ct. App.), *cert. denied*, 473 P.2d 911 (1970); *San Pedro Mining Corp. v. Board of County Comm'rs of Santa Fe County*, 909 P.2d 754 (N.M. Ct. App. 1995), *cert. denied*, 908 P.2d 750 (1996); *Gould v. Santa Fe County*, 37 P.3d 122 (N.M. Ct. App. 2001). Together the opinions of New Mexico's Supreme Court and Court of Appeals make up a clear and harmonious body of decisional law that provided ample guidance for the Tenth Circuit to properly apply the New Mexico law of preemption to the questions raised in this case.

This coherent body of New Mexico law clearly rendered the decision of the District Court below insupportable and required its reversal. It is axiomatic under New Mexico law that legislative acts, such as local government ordinances, are presumed to be legal, valid, and constitutional, and that New Mexico courts have "the duty of construing statutes, if possible, to resolve any apparent conflict." *Chapman v. Luna*, 678 P.2d at 690-91. *See also San Pedro Mining Corp. v. Board of County Comm'rs of Santa Fe County*, 909 P.2d at 758-59. It also is clear under New Mexico law, and the law of sister jurisdictions to which New Mexico courts refer for guidance, that a local ordinance may duplicate, complement, or provide for greater restrictions than a state statute, *Gould v. Santa Fe County*, 37 P.3d at 128; *San Pedro Mining*, 909 P.2d at 759-60; *City of Hobbs v. Biswell*, 473 P.2d at 921, and

that preemption or conflict between the state law and local regulation exists only where the state law and local regulation are irreconcilable, *City of Hobbs*, 473 P.2d at 920; *Cherokee Water and Sanitation District v. El Paso County*, 720 P.2d 1339, 1341 (Colo. Ct. App. 1989); *Von Lubken v. Hood River County*, 803 P.2d 750, 752 (Or. Ct. App. 1990).

Applying both the general principles and specific holdings of analogous cases from New Mexico's decisional law, the Tenth Circuit had a clear basis for deciding the pure questions of law before it and reversing the district court's erroneous construction of state law. In particular, the Court of Appeals derived guidance from the *San Pedro Mining* case, 909 P.2d 754, because that New Mexico intermediate appellate court decision is closely analogous to this case – holding that a county mining ordinance was not preempted by New Mexico's regulatory regime for mining, which is at least as comprehensive as the State's regulatory regime for forestry. *See Rancho Lobo*, 303 F.3d at 1202-05.

In a far-fetched attempt to give the issues decided below a federal patina, Petitioner embarks on a fanciful discussion of the supposed differences between federal and New Mexico preemption law and then makes the even more fanciful claim that the Tenth Circuit covertly applied federal preemption law. Petition at 8-10. There is not a shred of support for Petitioner's assertion that the Tenth Circuit erroneously applied the federal, rather than the state, law of preemption. Petitioner's assertion is especially outlandish given the fact that the Court of Appeals relied exclusively on New Mexico preemption law. Indeed, the Tenth Circuit's decision analyzes and applies only New Mexico state law, *see* 303 F.3d at 1200-1207, and its holdings closely follow and harmonize with

existing New Mexico law. Because the Tenth Circuit's decision below was correct, raises no question of federal law, and creates no conflict with any other court, there is no basis for granting a writ of certiorari in this case.

Petitioner's complaints regarding the Tenth Circuit's application of New Mexico law are especially ill-received because it was Petitioner who chose federal court as the forum for adjudication of this case. Having avoided New Mexico state court as a forum, it hardly lies in the mouth of Petitioner to argue that the federal court of appeals sitting in diversity jurisdiction was unable to apply, or ought not to have applied, New Mexico law. The fact that Rancho Lobo's petition for writ of certiorari is predicated on attacking its own forum of choice merely because it is unhappy with the outcome on appeal is reason enough to deny the petition.

III. The Tenth Circuit's Application of New Mexico Law, Rather than Certifying the Question to the State Supreme Court, Does Not Warrant the Exercise of this Court's Supervisory Power

As explained above, the Tenth Circuit thoroughly reviewed and properly applied the New Mexico state law of preemption in the decision below. Nonetheless, Petitioner argues that this Court must exercise its supervisory power because the Tenth Circuit did not certify the question of preemption to the New Mexico Supreme Court. Not only is this argument without merit, it reveals a fundamental failure to grasp the basic jurisprudential principles that guide federal courts in their exercise of diversity jurisdiction. It is in the nature

of federal diversity jurisdiction that federal courts sitting in diversity jurisdiction are called on to apply state law as a state court would. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). If, as Petitioner implies, the controlling state law in a diversity jurisdiction case could only be ruled on by the supreme court of that state, it would make an absurdity of diversity jurisdiction.

To begin with, Petitioner seems to believe that simply because the Tenth Circuit overruled the District Court on a question of state law its decision exemplifies "a pattern of circumventing modern procedures for determining novel unsettled questions of state law in diversity cases," requiring the exercise of this Court's supervisory power. Petition at 11. This contention ignores the basic rule in diversity cases that a district court's state law determinations are reviewed de novo and entitled to no deference. *Salve Regina College v. Russell*, 499 U.S. 225, 239 (1991); *Woolard v. JLG Industries, Inc.*, 210 F.3d 1158, 1168 (10th Cir. 2000). Accordingly, the Tenth Circuit's reversal of the District Court's state law determinations in this case does not in itself give rise to any inference of error, let alone "so far [a departure] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. Rule 10(a).

Petitioner also maintains that the Court of Appeals could not rule on the appeal because the most closely analogous New Mexico decisions on state law preemption of local land use ordinances are from the State's intermediate appellate court, rather than the state supreme court. Under established principles of jurisprudence, however, the Tenth Circuit clearly was authorized to use the more closely on point intermediate

appellate decisions as well as state supreme court precedent to guide its application of New Mexico state law in this case.

In this case, the Tenth Circuit looked to New Mexico Supreme Court decisions that set forth the broad principles of the State's law of preemption. Because the body of decisional law from the State's supreme court is limited, the Tenth Circuit also looked to decisions of the State's court of appeals for guidance, including a state court of appeals decision that is closely on point, namely *San Pedro Mining*. As the Tenth Circuit explained, 303 F.3d at 1202 n.2, considering intermediate state appellate court decisions where there is not a state supreme court decision on point is a well-established procedure that has been uniformly applied by this Court and all federal courts of appeals sitting in diversity jurisdiction. *See Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 630 n.3 (1988); *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 237-38 (1940); *Webco Indus., Inc. v. Thermatool Corp.*, 278 F.3d 1120, 1132 (10th Cir. 2002); *Federal Home Mortgage Corp. v. Seattle Insur. Co.*, ___ F.3d ___, 2003 WL 152738 (3d Cir. Jan 22, 2003); *McMahon v. Toto*, 311 F.3d 1077, 1080 (11th Cir. 2002); *Hermann Holdings Ltd. v. Lucent Technologies, Inc.*, 302 F.3d 552, 558 (5th Cir. 2002); *In re Watts*, 298 F.3d 1077, 1082-83 (9th Cir. 2002); *Gibbs-Alfano v. Burton*, 281 F.3d 12, 18-19 (2d Cir. 2002). In the face of this overwhelming precedent, Petitioner's argument that the Tenth Circuit's approach in this case deviated impermissibly from acceptable judicial norms is simply untenable.

IV. The Writ Should Be Denied Because the Tenth Circuit's Decision Has Not Created Any Crisis or Widespread Problem in New Mexico

Petitioner's contention that the Tenth Circuit's decision in this case has created a "major crisis" in New Mexico is unfounded. In support of this contention, Petitioner attempts to make much of an amicus curiae brief filed by the former governor of New Mexico in support of Petitioner's petition for rehearing en banc. In fact, there is no evidence to support Petitioner's self-serving claim of a crisis, and it would not be reasonable to infer a crisis from the former governor's brief. Indeed, for a number of reasons the former governor's brief has virtually no persuasive weight.

First, under New Mexico law the attorney general, not the governor, is the proper representative of the State in judicial proceedings. N.M. Stat. Ann. § 8-5-2 (1978). Were there an actual crisis, or even a genuine problem, one would expect the attorney general to have interceded in this case on behalf of the State long ago, but the attorney general has never sought to participate in this case at all. Second, the current governor of New Mexico has not adopted or endorsed the former governor's political position on the County's Ordinance. The fact that neither the attorney general nor the current governor seems to have noticed the "major crisis" that Petitioner claims was created by the Tenth Circuit's decision, or to have shown any concern over that decision, calls into question the credibility of the Petitioner's and the former governor's claim that the Tenth Circuit's decision is problematic from the State's

point of view.[1]

Even the former governor's belated amicus brief offered nothing more than speculation that the County's Ordinance *could* create some inconvenience to State Forestry Division officials in administering their wildfire prevention efforts, and the assertion that the possibility of such difficulties is of concern due to existing drought conditions. Petitioner repeatedly refers to the argumentative opinions in the former governor's brief as if they were evidence of a crisis concerning New Mexico's forest management and prevention of fires. *See* Petition at 10-12. Not only are the former governor's arguments not evidence, but, like Petitioner's own assertions, they are not supported by any evidence that the Timber Harvest Ordinance has resulted in any *actual* conflict with or inconvenience to the State Forestry Division's fire prevention efforts.

The speculative concerns advanced in Petitioner's briefs, and the former governor's belated amicus brief, are further belied by the fact that, despite being aware of the Timber Harvest Ordinance, the State Forestry Division expressed no opposition to, or concern with, the Ordinance when it was being

---

[1] Ironically, Petitioner concedes that "[u]nder ordinary circumstances, this appeal could be dismissed" as not meriting review on certiorari. Petition at 10. Yet the only "extraordinary" circumstances Petitioner offers in support of its argument that this case is worthy of review are current drought conditions and a claim that the County "chose to make their stand" (i.e., adopt the Timber Harvest Ordinance) "in the same year as the Cerro Grande fire." *Id.* Not only are these circumstances irrelevant to the issue of preemption, the latter also is factually inaccurate. Rio Arriba County adopted its Timber Harvest Ordinance in 1998. The Cerro Grande fire did not occur until 2000.

considered and adopted by the County. Accordingly, in addition to being irrelevant to the question of whether state law preempts the County's Timber Harvest Ordinance, the Petitioner's and former governor's claims of potential difficulty arising from the Ordinance are not credible.

Rather than a real crisis, then, concern over the Timber Harvest Ordinance appears to be a topic of political debate in New Mexico. Fortunately, there is no need, or call, for the Court to wade into state politics. Under New Mexico law the determination of preemption or conflict between state law and local regulation is a matter of statutory construction, a pure question of law, and therefore an exclusively judicial function. *Board of Comm'rs of Rio Arriba County v. Graecen*, 3 P.3d at 674; *cf. Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 989 (10th Cir. 1999) (same under federal law). Thus, as the Tenth Circuit panel noted at oral argument, the opinions or concerns of officials in the executive branch of state government regarding the County's Timber Harvest Ordinance are irrelevant to the judicial task of resolving the issue of preemption, which is a pure question of law. The proper forum in which to address such political arguments is the state legislature, not the courts.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

Simeon Herskovits
Counsel of Record
Western Environmental
Law Center
323 Los Pandos Road
P.O. Box 1507
Taos, New Mexico 87571
(505) 751-0351
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